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No. OFFICE OF THE CLERK

In The

Supreme Court Of The United States

October Term, 1997

MICHAEL G. MORGAN,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI (WITH ATTACHED APPENDICES)

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159 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether The Imposition By The Office Of Thrift Supervision Of A $1.5 Million Civil Penalty Upon Petitioner Constituted Punishment When The Actual Loss Caused By The Petitioner's Conduct Was $475,000 So That The Subsequent Indictment For The Same Conduct Was In Violation Of The Double Jeopardy Clause?

II. Whether The District Court's Finding Based Upon The Trial Record And Sentencing Hearing That $475,000 Was The Loss Caused By The Petitioner's Conduct Should Be Used In The Double Jeopardy Analysis Rather Than The OTS' Unproven Estimate Contained In The Notice Of Charges?

III. Whether The Costs Of Investigation And Enforcement Is A Valid Consideration In Establishing The Amount Of The Loss When Assessing Whether A Civil Sanction Is Remedial Or Punitive?

IV. Whether The Methodology Used By The Court of Appeals For The Second Circuit In Morgan (I) and Morgan (II) In Determining Whether A Civil Penalty Constituted Punishment Is In Conflict With The Methodology Used By This Court In United States v. Halper, 490 U.S. 435 (1989) As Well As By The Court Of Appeals For The Tenth Circuit in United States v. Hudson (I), 14 F.3d 536 (10th Cir. 1994), and United States v. Hudson (II), 92 F.3d 1026 (10th Cir. 1996)?

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CITATIONS TO OPINION AND ORDER BELOW

The Petitioner, Michael G. Morgan, respectfully requests that this Court grant a writ of certiorari seeking review of the summary order of the Court of Appeals for the Second Circuit in United States v. Morgan, 96-1632 (L) and 96-1711 (XAP), filed on May 21, 1997. The summary order is reprinted in Petitioner's Appendix at 2A-21A.

Additionally, the Petitioner filed a Petition For Rehearing And Suggestion For Rehearing In Banc to the Court of Appeals for the Second Circuit which was denied on July 17, 1997. The Court of Appeal's Order is reprinted in Petitioner's Appendix at 73A-74A (hereinafter "Pet. App. ___").

The foregoing appeal to the Court of Appeals for the Second Circuit was Petitioner's second appeal arising out of his indictment. The first appeal was filed as an interlocutory appeal in which Petitioner claimed that his prosecution was barred by the Double Jeopardy Clause. The Court of Appeals for the Second Circuit rejected the interlocutory claim in a detailed opinion. See United States v. Morgan, 51 F.3d 1105 (2d Cir.), cert. denied, __ U.S. ___, 116 S. Ct. 171 (1995), which are reprinted in Petitioner's Appendix at 48A-69A and 71A. The district court's opinion is reported at 845 F. Supp. 934 (D. Conn. 1994) and is reprinted in the Appendix at 28A-46A.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 21, 1997. See Pet. App. 2A. A Petition For Rehearing And Suggestion For Rehearing In Banc was denied on July 17, 1997. See Pet. App. 73A.

The petitioner is relying upon Rules 10 *et seq.* of the Rules of the Supreme Court of the United States in filing this petition.

The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254 ("Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 12, United States Code, § 1464(d)(1)(A):

§ 1464. Federal savings associations
(d) Regulatory authority
(1) In general
(A) Enforcement

The director shall have power to enforce this section, section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], and regulations prescribed hereunder. In enforcing any provision of this section, regulations prescribed under this section, or any other law or regulation, or in any other action, suit, or proceeding to which the Director is a party or in which the Director is interested, and in the administration of conservatorships and receiverships, the Director may act in the Director's own name and through the Director's own attorneys. Except as otherwise provided, the Director shall be subject to suit (other than suits on claims for money damages) by any Federal savings association or director or officer thereof with respect to any matter under this section or any other applicable law, or regulation thereunder, in the United States district court for the judicial district in which

the savings association's home office is located, or in the United States District Court for the District of Columbia, and the Director may be served with process in the manner prescribed by the Federal Rules of Civil Procedure.

Title 12, United States Code, § 1818(b):

§ 1818. Termination of status as insured depository institution

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound

practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed from a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the depository institution or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified herein), and shall remain effective and enforceable as provided therein, except to such extent as it

is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

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(6) AFFIRMATIVE ACTION TO CORRECT CONDITIONS RESULTING FROM VIOLATIONS OR PRACTICES.- The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to -

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if-

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

Title 12, United States Code, § 1818(e):

§ 1818. Termination of status as insured depository institution

(e) Removal and prohibition authority
The text of this statute is set out in the Appendix at 1A *et seq.*

Title 18, United States Code, § 657:
§ 657. Lending, credit and insurance institutions

Whoever, being an officer, agent or employee of or connected in any capacity with ... a bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution, other than an insured bank (as defined in section 656), the accounts of which are insured by the Federal Deposit Insurance Corporation, or by the National Credit Union Administration Board or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not

more than $1,000 or imprisoned not more than one year, or both.

Title 18, United States Code, § 1344:

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice-

(1) to defraud a financial institution; or

(2) to obtain any of the monies, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more that $1,000,000 or imprisoned not more than 30 years, or both.

Title 28, United States Code, § 1254:

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....

STATEMENT OF THE CASE

A. Introduction

The issue raised in this petition is whether the Petitioner's constitutional right against being twice put in jeopardy for the same offense was violated. The Petitioner respectfully submits that by signing a consent order which included a $1.5 million personal obligation in settlement of the civil charges brought against him by the Office of Thrift Supervision constituted a punitive civil sanction, thereby precluding the Government from later indicting him for the same conduct.

This Court recently granted a petition for writ of certiorari in United States v. Hudson, 92 F.3d 1026 (10th Cir. 1996), cert. granted 117 S. Ct. 1425, 137 L. Ed. 2d 534 (U.S. April 14, 1997) (No. 96-76), in which a similar issue is being considered.

B. Facts Material To The Consideration Of The Questions Presented.

On September 22, 1993, the grand jury returned a six count indictment against Michael G. Morgan, the founder and former President and Chief Executive Officer of Charter Federal Savings & Loan Association (hereinafter "Charter Federal"). United States v. Morgan, 51 F.3d 1105, 1109 (2d Cir. 1995); Pet. App. at 54A. The indictment alleged violations of two banking statutes, Title 18, United States Code, §§ 657 (misapplication of funds) and 1344 (bank fraud) relating to three separate transactions. Id. See also Indictment, Pet. App. at 100A-112A.

Charter Federal was a federal savings association located in Stamford, Connecticut that was organized in 1984. Morgan, 51 F.3d at 1108; Pet. App. at 50A. Mr. Morgan was in charge of its day-to-day operations. See Summary Order, Pet. App. at 4A. Charter Federal also conducted business through Bedford Equities Corporation (hereinafter "BEC"), a wholly-owned subsidiary formed for the purpose of acquiring and developing real estate. Id. BEC also was the general partner of Bedford Equities 1984 Limited Partnership (hereinafter "BELP 1984") that syndicated real estate acquired by BEC. Morgan, 51 F.3d at 1108; Pet. App. at 51A. Among the properties acquired by BEC were premises known as 1200 Summer Street, 30 Buxton Farms Road and 159 Franklin Street, all located in Stamford, Connecticut. Id.

Prior to the filing of the indictment, Mr. Morgan's activities relating to the purchase and/or sale of 1200 Summer Street, 30 Buxton Farms Road and 159 Franklin Street that are the subject of the charges in the indictment were investigated by the Office of Thrift Supervision (hereinafter "OTS"). Id. This investigation resulted in the filing of a Notice of Charges pursuant to 12 U.S.C. § 1818(b)[1] against Mr. Morgan on January 19, 1993. Id. Mr. Morgan was charged by the OTS with five counts of violations, unsafe or unsound practices, and/or breaches of fiduciary duty and ordered to cease and desist, direct

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[1] The OTS filed a "Notice of Charges and Hearing for an Order to Cease and Desist and to Direct Restitution and Other Affirmative Corrective Action and Notice of Intent to Prohibit" which also notified Mr. Morgan of their intention to prohibit him from participating in the conduct of business of any federally insured depository institution.

restitution and other affirmative corrective action, pursuant to 12 U.S.C. §§ 1464(d)(1)(A), 1818(b) and 1818(e).

Mr. Morgan entered into a stipulation of settlement with the OTS, and agreed to a consent order and consent judgment with respect to the claims contained in the civil charges. Id.

The charges in the Notice that are pertinent to the issues raised in this petition involved Mr. Morgan's role in three separate real estate transactions during the period 1984-1987. Id. The first charge of the Notice alleged that Mr. Morgan, as Chief Executive Officer and a member of the Board of Charter Federal, voted in favor of extending a loan to BELP 1984 for the purchase of property at 1200 Summer Street in Stamford, Connecticut without disclosing that he would receive $67,500 of a $75,000 brokerage commission paid by BELP 1984. Id. The Notice alleged that as a result, Mr. Morgan was unjustly enriched and caused loss or other damage to BEC in the amount of $67,500. Id.

The second charge asserted that Mr. Morgan improperly structured bank financing for the sale of 30 Buxton Farms Road so as to show a false profit and that he falsely inflated Charter Federal's income. Id.

The third charge asserted that Mr. Morgan paid another bank director, through a "straw" broker, a $200,000 commission. Id. Additionally, the Notice charged that Mr. Morgan directed that this fee improperly be deferred from 1986 to 1987 to improve Charter Federal's balance sheet for fiscal year 1986. Id., 51 F.3d at 1108; Pet. App. at 51A-52A.

The fourth charge claimed that Mr. Morgan falsely structured the sale of commercial property located at 159 Franklin Street by disguising a $450,000 loan as for "development" of the property when in fact the loan was used as a down payment on the purchase of the property. Id., 51 F.3d at 1108; Pet. App. at 52A.

All of the civil claims the OTS had against Mr. Morgan were settled through the execution of a Stipulation, Consent Order and Consent Judgment. Id., 51 F.3d at 1109; Pet. App. at 52A; see also Pet. App. at 86A et seq. Mr. Morgan neither admitted nor denied the charges made against him. Id. Under the settlement agreement, Mr. Morgan agreed to a consent judgment in the amount of $300,000.00 in order to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules. Id.; see also Pet. App. at 97A-98A. In addition to the consent judgment, Mr. Morgan agreed to pay the sum of $1,500,000.00 as a personal obligation pursuant to an agreed-upon payment schedule detailed in the consent order. Id., 51 F.3d at 1109; Pet. App. at 52A-53A; see also Pet. App. at 86A, 88A. The relevant portion of the consent order reads:

> a. RESPONDENT shall execute the annexed consent judgment in the amount of $300,000 to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against the RESPONDENT in the NOTICE. The OTS may record the judgment against the RESPONDENT but will not execute upon such judgment so long as RESPONDENT complies with the payment schedule set forth in Subparagraph 3.c. below.

> b. In addition to the judgment, RESPONDENT also agrees to pay the further sum of $1,500,000 pursuant to the schedule set forth in Subparagraph 3.c. This payment obligation is a personal obligation of the RESPONDENT and upon his death will not be an obligation of his estate.

Id., 51 F.3d at 1109; Pet. App. at 53A; see also Pet. App. at 88A. Further, the Consent Judgment specified, in part, the following:

> NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Plaintiff shall recover of the Defendant $300,000 without costs, payable according to the schedule provided in the Consent Order.

See Pet. App. at 98A.

Approximately eight months after the execution of the settlement documents, Mr. Morgan was indicted and charged with two counts of bank fraud in violation of 18 U.S.C. § 1344 and four counts of misapplying bank funds in violation of 18 U.S.C. § 657 in connection with his conduct in the transactions relating to the properties at 1200 Summer Street, 30 Buxton Farms Road and 159 Franklin Street. Morgan, 51 F.3d at 1109; Pet. App. at 54A. All of the criminal charges set forth in the indictment stem from the same events addressed by the January 19, 1993 civil Notice of Charges.[2] Id.

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[2] The same transactions which were the subject of the OTS Notice Of Charges were also the focus of the Indictment. In fact, as

Prior to trial, relying upon United States v. Halper, 490 U.S. 435, 448-49 (1989), Mr. Morgan moved to dismiss the indictment on the ground that it violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. Pet. App. at 34. Specifically, Mr. Morgan argued that the prosecution constituted double jeopardy since it was based upon the same conduct for which Morgan already had been punished by the imposition of a $1.5 million penalty in the civil proceeding prosecuted by the Office of Thrift Supervision. Upon the district court's (Daly, U.S.D.J.) denial of the motion, Mr. Morgan filed an interlocutory appeal in the Court of Appeals for the Second Circuit. Morgan, 51 F.3d at 1109; Pet. App. at 54A; see also Summary Order, Pet. App. at 5A.

The Court of Appeals for the Second Circuit (Feinberg, Kearse, and Cardamone, Js.) rejected Mr. Morgan's argument and affirmed the ruling of the district court. See United States v. Morgan, 51 F.3d 1105 (2d Cir. 1995) (Pet. App. 48A-69A). Mr. Morgan argued in the district court and on appeal to the Court of Appeals for the Second Circuit that no accounting was necessary because it

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noted by the district court in its ruling on the Defendant's motion to dismiss, "[t]he government concedes the indictment is based upon the conduct that formed the basis of the civil proceedings initiated by the OTS." Pet. App. at 33A. For example, Count One of the Indictment, which alleged criminal wrongdoing by Mr. Morgan relating to the 1200 Summer Street transaction, is almost identical to the First Charge and Ground contained in the Notice of Charges. Likewise, the Counts Two, Three and Four of the Indictment are duplicative of the Third Charge and Ground as alleged in the Notice of Charges filed by the OTS. Finally, the substance of Counts Four and Five of the Indictment are also alleged in the Fourth Charge and Ground in the Notice of Charges filed by the OTS.

is clear from the language of the Consent Order and the Consent Judgment that the remedial penalty and the retributive penalty were divided into two separate categories. The OTS issued the Consent Order pursuant to Title 12, United States Code, §§ 1818(b) and (e). Subsection (b) permits the OTS "to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued," which includes requiring restitution. 12 U.S.C. § 1818(b)(6) (emphasis added). The Consent Order which was issued by the OTS divided the sanctions imposed upon Mr. Morgan into two separate categories: (1) a judgment of $300,000, which served a remedial purpose "to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against [Morgan] in the Notice," and, (2) "in addition to the judgment," an additional fine of $1,500,000 "as a personal obligation" which can only represent punishment.

The Court of Appeals for the Second Circuit rejected this argument and held that Mr. Morgan failed to make a threshold showing that the terms of the civil settlement could be construed as punishment. United States v. Morgan, 51 F.3d 1105, 1115-16 (2d Cir. 1995); Pet. App. at 68A-69A. The Court of Appeals accepted the district court's conclusion that the only goal of the OTS civil proceeding was to obtain restitution. This conclusion was based in part upon the fact that the consent judgment of $1.8 million represented a compromise of the amount the bank lost that reasonably could be attributed to Mr. Morgan's conduct since no other basis for the compromise was set forth in the settlement documents. Morgan, 51 F.3d at 1115; Pet. App. at 67A-68A. The Court of Appeals accepted the district court's adoption of the amount of the

loss as averred in the OTS Notice of Charges, that is, $2,275,000, and found that the $1.8 million sanction was not overwhelmingly disproportionate to the government's damages and expenses. Id. at 68A-69A.

A Petition For Writ Of Certiorari was denied by this Court on October 2, 1995. United States v. Morgan, ____ U.S. ____, 116 S. Ct. 171 (1995) (Mem), Pet. App. at 71A.

Mr. Morgan was tried before the Honorable T. F. Gilroy Daly in March 1996, and a jury found him guilty on all six counts. While Mr. Morgan's motion for new trial and posttrial motion for acquittal were pending, Judge Daly became ill and resigned. Chief Judge Dorsey assumed responsibility for the case under Fed. R. Crim. P. 25(b). Judge Dorsey denied Mr. Morgan's posttrial motions without issuing an opinion. See generally Summary Order, Pet. App. at 5A.

Mr. Morgan was sentenced primarily to a period of thirty-three months imprisonment.[3] See Summary Order, Pet. App. at 5A. At the sentencing hearing held on September 23, 1996, the district court found that the amount of the loss suffered by Charter Federal as a result of Mr. Morgan's conduct with respect to the transactions for 30 Buxton Farms Road and 159 Franklin Street (Counts Two through Six) was $400,000.00, see excerpt from

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[3] Mr. Morgan was sentenced on September 23, 1996 under the Sentencing Reform Act of 1984 for Counts Two through Six while Count One was treated as a pre-guidelines count since the activity took place in 1984, prior to the effective date of the guidelines.

Sentencing Transcript, Pet. App. at 24A-25A, and the loss on Count One was $75,000.00. See Pet. App. at 122A.

Mr. Morgan appealed to the Court of Appeals for the Second Circuit from his conviction and sentencing, claiming inter alia that the imposition of a $1.5 million penalty against Mr. Morgan in the OTS proceedings constituted punishment under the double jeopardy clause since the loss to the bank caused by Morgan's actions was $400,000.

The Court of Appeals (Feinberg, Cardamone and Leval, Circuit Judges) affirmed the conviction and sentencing in a twelve page summary order filed May 21, 1997. See Pet. App. at 2A-21A.

After the parties' briefs had been filed, but before oral argument, this Court granted review in United States v. Hudson, 92 F.3d 1026 (10th Cir. 1996), cert. granted 117 S. Ct. 1425, 137 L. Ed. 2d 534 (U.S. April 14, 1997) (No. 96-76), in which a similar double jeopardy issue is being considered. In Hudson, after the Office of the Comptroller of Currency ("OCC") issued civil penalties against the defendants for banking violations, the defendants entered into consent orders in which they consented to pay a total of $46,600 in sanctions and to not participate in banking activities without prior authorization from the government. Hudson, 92 F.3d at 1027-8. The OCC maintained that the defendants' banking violations caused approximately $900,000 in losses to the Federal Deposit Insurance Corporation. Following an evidentiary hearing, the district court found that the government's proven costs were $72,000, the amount that the OCC spent pursuing the defendants. Id. The district court dismissed

the criminal indictment on the ground of double jeopardy, concluding that the monetary sanctions imposed upon the defendants were not solely remedial and that the fines were imposed for the same offenses charged in the indictment. The Tenth Circuit Court reversed, concluding that the government's losses attributable to the defendant's misapplication of bank funds far exceeded the fines imposed by the Office of the Comptroller of Currency, and therefore, those sanctions could fairly be characterized as remedial, rather than punitive for double jeopardy purposes. Hudson, at 1030.

Prior to argument, the undersigned counsel informed the Court of Appeals of this Court's action relating to Hudson. In its Summary Order, the Court of Appeals failed to address the Hudson issue. The Petitioner filed a Petition For Rehearing And Suggestion For Rehearing In Banc to the Court of Appeals for the Second Circuit and cited this Court's order granting certification in Hudson in connection with the Petitioner's double jeopardy claim. However, the Petition For Rehearing was denied without opinion on July 17, 1997. See Pet. App. at 73A-74A.

ARGUMENT AMPLIFYING THE REASONS FOR GRANTING THE WRIT

I. The Court of Appeals For The Second Circuit's Rejection Of Petitioner's Claim That The Imposition Of A $1.5 Million OTS Civil Penalty Is Overwhelmingly Disproportionate To The Actual Loss Of $475,000 So As To Constitute Punishment Under The Double Jeopardy Clause Conflicts With Applicable Decisions Of This Court, And Therefore, The Petition For Writ Of Certiorari Should Be Granted.

A. Procedural Introduction

At sentencing, the district court found that the amount of the loss suffered by Charter Federal as a result of Mr. Morgan's activity on Counts Two through Six was $400,000.00, see Pet. App. at 25A, and the loss on Count One was $75,000.00. See Pet. App. at 122A. On appeal to the Court of Appeals, Mr. Morgan argued since a factual determination of the actual amount of the loss based upon the evidence adduced at the trial had been made, it is that amount which should be used to analyze the double jeopardy claim rather than the adoption of the amount of the loss alleged in the OTS Notice of Charges. See Pet. App. at 13A. Thus, in using the $475,000 actual loss determination of the sentencing court, Mr. Morgan submits that the $1.5 million civil sanction is overwhelmingly disproportionate so as to constitute punishment, and therefore, the criminal prosecution was in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

The Court of Appeals rejected this argument in its Summary Order issued May 21, 1997 and held that "[a] finding of loss attributable under the sentencing guidelines does not purport to calculate the total amount of loss to the government caused by the defendant's conduct." Pet. App. at 13A. The Court of Appeal's analysis conflicts with decisions of this Court, and therefore, the Petition should be granted. Furthermore, since this Court granted review to a similar issue raised in United States v. Hudson, 92 F.3d 1026 (10th Cir. 1996), cert. granted 117 S. Ct. 1425, 137 L. Ed. 2d 534 (U.S. April 14, 1997) (No. 96-76), this Petition should be granted.

B. Relevant Supreme Court Precedent

"This Court many times has held that the Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." United States v. Halper, 490 U.S. 435, 440 (1989). Moreover, with respect to the "multiple punishments" component, "the language of the Double Jeopardy Clause protects against more than the actual imposition of two punishments for the same offense; by its terms, it protects a criminal defendant from being twice put in jeopardy of such punishment." Witte v. United States, ____ U.S. ____, 115 S. Ct. 2199, 2204 (1995). Thus, the Double Jeopardy Clause prohibits, not only punishing twice, but also "'attempting a second time to punish criminally for the same offense.'" United States v. Ursery, ____ U.S. ____, 116 S. Ct. 2135, 2139-2140 (1996).

Applying those principles, this Court unanimously held in United States v. Halper, 490 U.S. 435 (1989), that money penalties, although imposed in a civil proceeding, constitute "punishment" for double jeopardy purposes when they "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." Id. at 448.[4] This Court further determined that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction if the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." Halper, 490 U.S. at 448-9.

As noted by this Court in Halper, "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the

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[4] Halper was the target of a civil False Claims Act lawsuit following his prosecution, conviction, and sentencing on 65 counts arising from false reimbursement claims he had submitted to the United States. Although the false claims had caused a loss to the United States of only $585, in the subsequent civil action Halper was subject to a statutory penalty of more than $130,000. The question presented in Halper was "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." 490 U.S. at 443. This Court unanimously held that it could. In view of the "disproportionate" relationship between Halper's potential civil penalty and the apparent losses and costs to the government arising from his conduct, this Court concluded that the civil sanction might well constitute punishment. Id. at 452. The case was remanded to afford the government an opportunity to show that its actual costs were higher than the district court had surmised. Id.

proceeding giving rise to the sanction, that must be evaluated."[5] Id., at 447 n.7. Therefore, a civil sanction constitutes punishment when the sanction as applied in the individual case serves the purposes of retribution and deterrence, the twin goals of punishment. Id., at 448.[6]

In this case, the Government did not establish any remedial purpose served by the $1.5 million money penalty

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[5] This Court's cases make clear that money penalties, even when denominated "civil," may nevertheless constitute punishment for double jeopardy purposes where their actual purpose is not remedial, but is instead to provide deterrence or retribution. As the Court explained in United States v. La Franca, 282 U.S. 568, 573 (1931), "[t]he term 'penalty,' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." Where money penalties are imposed, not to remedy an injury to the government, but simply as "an exaction imposed by statute as punishment for an unlawful act," a "grave constitutional question" may be presented by successive proceedings. Id. at 572. See also United States v. Ursery, 116 S. Ct. 2135, 2142 (1996) ("in rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties").

[6] In Halper, this Court began by rejecting the government's contention that a sanction could be punitive only if Congress expressly said that it was. 490 U.S. at 447. This Court explained that "while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." Id. "This constitutional protection," the Court emphasized, "is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." Id.

it imposed on Mr. Morgan, nor can it be said that the penalty served solely a remedial purpose. In short, the money penalty -- particularly when considered in conjunction with the prohibition from banking and the $300,000 judgment -- was plainly punitive.

C. The Sentencing Court's Finding That The Actual Loss Was $475,000 Renders The $1.5 Million OTS Civil Penalty Disproportionate, Thereby Constituting Punishment For Purposes Of The Double Jeopardy Clause.

1. The district court's finding based upon the trial record and sentencing hearing that $475,000 was the loss caused by Morgan's conduct should be used in the double jeopardy analysis rather than the OTS' unproven estimate contained in the Notice Of Charges.

The Court of Appeals' reliance upon the OTS estimate of loss in its unproven Notice of Charges rather than the amount of the loss which the district court found based upon the trial record and sentencing hearing is illogical. In its Notice of Charges, the OTS estimated a total loss due to Morgan's conduct to be $2.275 million. Following a trial and an extended sentencing hearing where the government offered substantial evidence relating to the amount of the loss, the district court found the loss to be $400,000 on the Buxton Farms Road and Franklin Street transactions (Counts Two through Six) and $75,000 on the Summer Street transaction (Count One). Thus, the Second Circuit's adoption of the OTS "estimate" as opposed to the

amount of the loss proven through the presentation of evidence at a trial and sentencing hearing is irrational.

Furthermore, the Second Circuit's reliance upon the fact that at sentencing the district court did not consider loss due to a fourth transaction, the Lindale Manor project -- which was included in the OTS estimate but not part of the indictment -- to support its rejection of the district court's actual loss figure underscores Mr. Morgan's position in his original appeal prior to trial and in his Petition for Rehearing filed in connection with the second appeal that the matter should have been remanded for an evidentiary hearing to determine the actual losses incurred.[7]

Finally, the Court of Appeals' claim that the district court's determination of loss should be rejected because it did not include "governmental loss attributable to the cost of investigation and enforcement" is not valid. This issue has been raised by the petitioners in Hudson. See Hudson v. United States, United States Supreme Court Petitioner's Brief, No. 96-976, 1997 WL 353074, at *27-32 (June 25, 1997); United States Supreme Court Amicus Brief (Washington Legal Foundation), No. 96-976, 1997 WL 353095, at *9-18 (June 26, 1997); United States Supreme Court Amicus Brief (National Association Of Criminal

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[7] Mr. Morgan respectfully submits that the Government cannot demonstrate a loss in connection with the Lindale Manor project. it is interesting to note that the government elected not to indict Morgan in connection with the Lindale Manor transaction, nor did it attempt to establish it as relevant conduct for the purpose of proving actual loss at sentencing.

Defense Lawyers), No. 96-976, 1997 WL 355633, at *9-13 (June 26, 1997).

The Hudson petitioners in their brief, as well as in the amicus briefs, have claimed that the costs of investigation and enforcement is not a valid consideration when assessing whether a civil sanction is remedial or punitive in their case. Their argument is equally applicable to this case.

First, they argue that the government was not a victim of petitioners' conduct, and therefore the penalties imposed cannot be justified as a remedy for the Government. In S.A. Healy Co. v. OSHRC, 96 F.3d 906, 910 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit noted that simply recovering investigative and enforcement costs "cannot be remedial, because the United States is not the injured party, and the fine produces no benefit for those who were injured--except through general and specific deterrence, the standard objectives of the criminal law."[8] A "remedial" monetary sanction, by contrast, is one that compensates a victim for injury caused by the defendant's unlawful conduct.[9] In this case, the

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[8] The Seventh Circuit also noted that "[i]f we were to treat deterrence (and the costs of achieving it) as 'remedial,' then the entire criminal apparatus would be remedial." S.A. Healy, 96 F.3d at 910.

[9] It is imposed for the purpose of restoring the victim to the position he would have occupied had the improper conduct not occurred--or, put another way, for the purpose of making the victim whole. See Halper, 490 U.S. at 449 (noting the "remedial purpose" of "a civil sanction" of "making the Government whole" in a case in

government's expenditure on law enforcement is not an injury against which the underlying statute is designed to protect and the sanctions imposed for its violation cannot be viewed as remedial.

Second, the Hudson petitioners argue that unlike the False Claims Act at issue in Halper, the statute under which they were penalized makes no provision for the government's costs of investigation or prosecution, and is therefore not intended to make the government whole. Likewise, in the present case, 12 U.S.C. § 1212(b) also makes no provision for the government's costs of investigation or prosecution, and accordingly, this argument is applicable to this case.

2. Applying this Court's double jeopardy principles, there is no doubt that the civil sanctions imposed on Mr. Morgan constituted punishment for double jeopardy purposes.

As noted supra at 12-13, the Consent Order issued by the OTS divided the money sanctions imposed upon Mr. Morgan into two separate categories: (1) a judgment of $300,000, which served a remedial purpose "to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against [Morgan] in the Notice," and, (2) "in addition to the judgment," an additional fine of $1,500,000 "as a personal obligation" which can only represent punishment. Thus, the plain language of the consent order

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which the Government was the injured party).

establishes that the $1.5 million "personal obligation" served no remedial purpose, and, in fact, was punishment.

However, if the proper test in determining whether a civil sanction constitutes punishment is disproportionality between the government's damages and the amount of the sanction,[10] then the money sanctions of $1.8 million imposed by the OTS here are clearly disproportionate in light of the sentencing court's determination that the loss caused by Mr. Morgan's conduct was $475,000. The Second Circuit's rejection of this argument is without citation to legal authority and is in conflict with the principles enunciated by this Court in Halper.

Applying the double jeopardy principles discussed supra, there is no doubt that the civil sanctions imposed on Mr. Morgan constituted punishment for double jeopardy purposes. There is simply no question that the civil sanctions imposed in this case crossed the "line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." United States ex rel. Marcus v. Hess, 317 U.S. 537, 548-9

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[10] A review of this Court's decisions demonstrates that gross disproportionality is not the sole double jeopardy limitation on civil punishment; instead, Halper is an additional limitation which addresses the rare case in which the penalty is grossly disproportionate to the Government's costs and damages, even though the fine was intended to be based upon the harm and cost to the Government. Where, as in this case, the penalty was not and could not have been based upon the harm or cost to the government, the penalty constitutes punishment regardless of whether it is grossly disproportionate to the government's alleged costs.

(1943). Furthermore, given the disproportionality between $475,000 and $1.8 million, the sanctions "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." Halper, 490 U.S. at 448 (emphasis added). A "particularized assessment" of the entire civil sanction -- both the $300,000 judgment (to correct the conditions alleged) and the $1.5 million personal obligation -- in this case reveals that the $1.5 million personal obligation was indeed punitive.

D. The Methodology Used By The Court of Appeals For The Second Circuit In Determining Whether A Civil Penalty Constituted Punishment Is In Conflict With The Methodology Used By This Court In Halper As Well As By The Court Of Appeals For The Tenth Circuit In Hudson (I) And Hudson (II), And Therefore, This Petition For Writ Of Certiorari Should Be Granted.

Mr. Morgan submits that the Court of Appeal's assumption that the amount of the loss alleged by the OTS in the Notice of Charges ($2,275,000) was the actual amount of the loss is in conflict with the Court of Appeals for the Tenth Circuit's decision in United States v. Hudson, 14 F.3d 536 (10th Cir. 1994), on remand, 92 F.3d 1026 (10th Cir. 1996), cert. granted., ____ U.S. ____, 117 S. Ct. 1425, 137 L. Ed. 2d 534 (1997), as well as with this Court's decision in Halper. In Hudson (I), the defendants were indicted for criminal law violations because of their alleged mismanagement and illegal operation of several banks. Hudson (I), 14 F.3d at 538. These violations were based upon the same lending transactions which were the subject of prior administrative sanctions imposed against

the defendants by the Comptroller of the Currency ("OCC") for violations of various federal banking laws. Id. The OCC alleged that the defendants' violations caused $900,000 in losses. Id. The defendants entered into a Stipulation and Consent Order whereby one defendant agreed to pay $16,000 and the other three defendants agreed to pay $15,000 each. They also agreed not to participate in any banking activities without receiving prior written authorization from the OCC. Id. On appeal, the Hudson (I) court concluded that the district court's determination that the amounts of the fines were reasonable was without any factual support in the record and that the court made no finding as to the actual losses incurred nor who may have suffered the losses, and how they compared to the sanctions imposed. Id.

Just as the district court in Hudson made a determination that the amounts of the fines were reasonable without any factual support in the record and without determining the amount of the actual losses, both the district court and the Second Circuit in Morgan (I) found that the $300,000 judgment and the $1.5 million personal obligation represented a reasonable compromise of the amount lost by the bank without any factual support in the record as to the amount the bank actually lost.

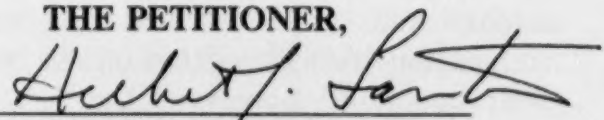
The Court of Appeals in Morgan (I) and Morgan (II) incorrectly accepted the unconfirmed allegations set out in the Notice of Charges that the bank losses were approximately $2,275,000. While this Court recognized that the process of determining the amount of damages the Government suffered "involves an element of rough justice," see Halper, 490 U.S. at 449, this Court did not sanction the use of unsubstantiated allegations in

determining whether a penalty constituted punishment. Therefore, just as in Hudson and in Halper, the Second Circuit should have remanded this case for a determination as to the actual losses incurred, as to who may have suffered the losses, and how they compared to the sanctions imposed. Accordingly, this Court should grant the Petition since the Court of Appeals for the Second Circuit decided a federal question in a way that conflicts with this Court's decision in Halper and with the Court of Appeals for the Tenth Circuit's decisions in Hudson (I) and Hudson (II).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

THE PETITIONER,

BY 

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No. _____

In The

Supreme Court Of The United States

October Term, 1997

MICHAEL G. MORGAN,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

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The Summary Order Of The
Court of Appeals for the Second Circuit

Issued May 21, 1997

CTDC-NHCT
93-cr-212
DORSEY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of May, one thousand nine hundred and ninety-seven.

PRESENT:

Honorable Wilfred Feinberg,
Honorable Richard J. Cardamone,
Honorable Pierre N. Leval,
Circuit Judges.

United States of America,

Appellee-Cross-Appellant,

v. 96-1632, 1711

Michael G. Morgan,

Defendant-Appellant-Cross-Appellee.

APPEARING FOR APPELLANT:
Hubert J. Santos, Hartford, Conn.

APPEARING FOR APPELLEE:
Kari A. Pedersen, Assistant United States Attorney for the District of Connecticut, Bridgeport, Conn.

Appeal from the United States District Court for the District of Connecticut (Peter C. Dorsey, Chief Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

Michael G. Morgan appeals from his conviction on two counts of bank fraud in violation of 18 U.S.C. § 1344 and four counts of misapplication of bank funds in violation of 18 U.S.C. § 656. He also claims that the sentence imposed resulted from misapplication of the sentencing guidelines. The United States cross-appeals, arguing that sentencing judge erroneously excluded relevant conduct for purposes of calculating the proper guidelines range, erred in determining the amount of loss, and erred by denying an enhancement of Morgan's sentence for more than minimal planning.

Michael G. Morgan is the founder and former president of Charter Federal Savings and Loan Association ("Charter Federal"). Charter Federal opened for business in 1984, with Morgan in charge of its day-to-day operations. Charter Federal also conducted business through Bedford Equities Corporation ("Bedford"), a wholly-owned subsidiary formed for the purpose of acquiring and developing real estate. Among the properties acquired by Bedford were 1200 Summer Street, 30 Buxton Farms Road, and 159 Franklin Street, Stamford, Connecticut.

In 1990, Charter Federal became insolvent and was seized by the Resolution Trust Corporation. The Office of Thrift Supervision ("OTS") began an investigation of Charter Federal's business practices shortly thereafter.

Morgan was subpoenaed by the OTS in August 1990, and answered fully all questions. In 1993, the OTS filed a formal notice of charges against Morgan. Morgan entered into a consent order with the OTS settling the formal charges; he agreed to pay $1.8 million to the OTS and never again work in the banking industry.

In 1993, Morgan was indicted on six counts of bank fraud and misapplication of bank funds. The charges stemmed from Morgan's activities in relation to acquisition of the Summer Street, Buxton Farms Road, and Franklin Street properties. Morgan moved to dismiss the indictment on the grounds of double jeopardy; his motion was denied, and this court affirmed the denial on interlocutory appeal. United States v. Morgan, 51 F.3d 1105 (2d Cir.), cert. denied, __ U.S. __, 116 S. Ct. 171 (1995). Morgan was tried before the Hon. T.F. Gilroy Daly, and a jury found him guilty on all six counts. When Judge Daly became ill and resigned, Chief Judge Dorsey assumed responsibility for the case under Fed. R. Crim. P. 25(b). Judge Dorsey denied Morgan's motion for a new trial and sentenced Morgan primarily to a period of thirty-three months imprisonment.

Both Morgan and the government raise numerous challenges on appeal. We address them in turn.

A. MORGAN'S ARGUMENTS ON APPEAL

1. Insufficient Evidence. Morgan argues that there is insufficient evidence to support his conviction for bank fraud and misapplication of funds.

a. 1200 Summer Street. The evidence showed that Morgan urged Charter Federal's board of directors (the "Board") to approve Bedford's acquisition of the property for $3.65 million plus a real estate commission of $150,000 (to be paid by Bedford). Morgan told the Board that the commission would be split equally between the listing broker and Samuel Boyarsky, a broker who introduced the seller of the property to Morgan. In fact, Boyarsky agreed to act as a straw man in the transaction and secretly returned $67,500 of the commission to Morgan, despite the Board's determination that Morgan would not be allowed to earn commissions on Charter Federal transactions.

Morgan argues that he cannot be convicted for misapplication of bank funds in relation to this transaction because there is no evidence that his actions exposed Charter Federal to an increased risk of pecuniary loss. See United States v. Clark, 765 F.2d 297, 302-03 (2d Cir. 1985). In Clark, this court explained that conviction for misapplication of bank funds requires that the bank officer's conduct involve more than the violation of a rule or policy not designed to protect the bank's assets against loss. A risk of pecuniary loss is relevant, the Clark court explained, to determine whether the defendant had the necessary intent to cause financial injury to the bank. 765 F.2d at 302.

Morgan claims that $150,000 in commission would have been paid even if he had not misled the Board as to who would rereceive [sic] the commission. His argument is meritless. Morgan's misrepresentations caused Charter Federal to pay a $75,000 commission to Boyarsky. The testimony adduced at trial shows that Boyarsky earned, and

kept, only $7,500. Thus, Charter Federal paid out $67,500 unnecessarily, suffering actual loss due to Morgan's intentional misrepresentations. A banking officer who circumvents bank policies in order to obtain money for himself intends to injure the bank economically, and may be convicted under 18 U.S.C. § 656. See Clark, 765 F.2d at 305.

Morgan also argues that the commission was paid by Bedford, and thus did not cause a net loss to Charter Federal. Even if Bedford's funds are not considered to be assets of Charter Federal, a question which we need not decide, Morgan's conviction still must stand. Bedford's funds were on deposit with Charter Federal. A bank officer is prohibited under 18 U.S.C. § 656 from misapplying not only the assets of the bank, but also monies in the bank's "custody or care." 18 U.S.C. § 656. This same answer applies to Morgan's argument that the government has not traced the source -- whether a loan from Charter Federal or money from Bedford's escrow account -- of the commission payment. The $75,000 check given to Boyarsky was drawn from a Charter Federal account, and thus involved money in Charter Federal's custody.

Finally, Morgan argues that the commission did not involve funds belonging to Charter Federal because the original purchase price of the property was $3.8 million, with the seller responsible for paying the $150,000 commission, while the final purchase price was $3.65 million, with the buyer paying a $150,000 commission. Morgan argues that the $150,000 commission was thus "in reality the seller's money." This is meritless. Charter

Federal could have structured the transaction so that commission fees were paid by the seller. It did not do so. The commission fees were paid with funds deposited at Charter Federal.

b. 30 Buxton Farms Road. Bedford purchased this commercial property in 1985; in 1986, Morgan decided to sell. William Malloy, a member of the Board, suggested two potential purchasers for the property, one of whom was a business partner of Malloy's on an unrelated project. Morgan and Malloy agreed that Malloy would receive a $200,000 commission if the purchase was completed. Because Malloy was a member of the Board, however, Morgan felt that Malloy should not approach the purchasers directly or list his name as the broker of record on the contract for sale, in order to hide any conflict of interest from the Board and to keep the prospective purchasers from finding out that their business partner was benefitting from the purchase.

Morgan and Malloy therefore agreed to list another broker in Malloy's office as the broker of sale. That broker -- Brian Egan -- testified at trial that he was unaware that he was listed as the broker of sale, had no involvement in the sale of the property, and never received any commission.

As the treasurer of Charter Federal was preparing the year end close-out of the bank's books, she realized that the bank would not meet its capital ratio requirements if the $200,000 commission were paid. She informed Morgan of the problem. Morgan asked Malloy if he would defer receipt of the commission. Malloy agreed.

In order to record falsely-inflated profits for Charter Federal, Morgan needed a waiver of commission signed by the broker of record. Malloy was given a prepared waiver filled out with the name and home address of Brian Egan and forged Egan's signature. Morgan and Malloy agreed that the commission would be paid at a later date notwithstanding the waiver of commission.

Although Malloy was willing to defer payment, however, he needed money immediately. Morgan told Malloy to ask Egan to apply for a $100,000 loan under Egan's name which Morgan assured him would be personally approved. The money would be funnelled through Egan to Malloy. Malloy approached Egan and told him that he needed the money to meet cash flow obligations on various construction projects. Egan agreed to apply for a loan once he was told he would not be responsible for its repayment or any interest payments. Morgan informed a senior loan officer at the bank that Egan had been approved for the loan, and the loan was granted. Egan passed the proceeds received from the loan on the Malloy, as planned.

Over a year after the closing of the Buxton Farms Road transactions, Malloy again asked to be paid his commission. Morgan told Malloy to submit invoices for "consulting" services in Egan's name in connection with the sale of another Bedford property. Malloy submitted two false invoices, which were approved for payment by Morgan. Payment on the first invoice was used to repay Egan's $100,000 "loan" from the bank; Malloy forged Egan's endorsement on the second check and used it to repay a debt to a third party.

Morgan argues that the government failed to prove the elements of bank fraud and/or misapplication of bank funds in relation to the 30 Buxton Farms Road transaction because the Board approved payment of a $200,000 commission for the transaction and therefore Morgan's conduct did not expose the bank to an actual or potential loss. Morgan's argument assumes, however, that the Board approved payment of $200,000 to Malloy. In fact, the Board approved a transaction which provided for commission to be paid to Egan, not Malloy. Its is pure speculation that the Board would have approved the payment of a $200,000 commission had they known that the money would be paid to Malloy. Moreover, after Morgan submitted the waiver of commission, Charter Federal had no further obligation to pay the commission. Malloy received $200,000 by submitting phony invoices in another person's name for work never performed. Payment of the invoices constituted actual loss to Charter Federal. Finally, Morgan's argument completely ignores his actions in falsifying Charter Federal's books in order to improve its profit line and maintain its capital ratio, actions which exposed Charter Federal to risk of economic loss by misleading regulators, the Board, and the bank's shareholders about the actual state of the bank's finances.

c. 159 Franklin Street. Bedford acquired 159 Franklin Street and successfully obtained zoning approval to increase the number of units. Morgan was contacted by Burt Hoffman, a local developer who owned the property next to 159 Franklin and proposed consolidation of the two pieces of land for residential housing development. Hoffman told Morgan that he lacked capital for the project, and would need 100% financing for acquisition and

development of the property. Morgan introduced Hoffman to Donna Crandley, an employee of Bedford and Charter Federal, and told Hoffman to work with Crandley on the project.

Crandley explained that a purchaser would be required to give 20% of the purchase price as a down payment for 159 Franklin Street in order for Charter Federal to recognize a profit on the sale and comply with the bank's accounting requirements. (If 100% financing were offered, the bank would have to defer recognition of profit on its books and records.) Hoffman responded that he and his partners had no cash available. Crandley then presented a package of two loans -- a $1,600,000 loan for the purchase/acquisition of the Franklin Street property, and a $1,875,000 development loan -- with the understanding that Hoffman could contribute the required $400,000 down payment from development loan funds. Hoffman agreed to the proposal, submitted a falsified draw-down request for $450,000 purportedly to be used for site development (but in fact used for the $400,000 down payment), and submitted a letter for Charter Federal's financial statements which erroneously stated that $400,000 was paid at the closing of the purchase as an initial down payment. The letter was used to mislead Charter Federal's auditors as to the actual source of the money and allow Crandley to report a profit on the sale in violation of applicable accounting standards.

Morgan argues that he cannot be convicted for misapplication of bank funds or fraud based on his involvement in the Franklin Street transaction because 100% financing is not a crime. Although 100% financing

is legal, the use of false documents to obtain the financing is not. The financing scheme caused the bank to lend $3,475,000 under false pretenses, and the unauthorized posting of a profit on the transaction (in violation of accounting rules) caused Charter Federal to issue false and misleading statements about its financial position.

We reject Morgan's contention that the evidence was insufficient to support his conviction on any count.

2. Grant of a New Trial

Morgan contends he is entitled to a new trial on the theory that, because Judge Dorsey did not hear the trial, he was incapable of ruling on Morgan's witness credibility contentions advanced in his post-trial motion for a new trial. He contends Judge Dorsey was therefore incapable of performing the duties imposed on a judge who is substituted after verdict under Rule 25(b) and obligated to grant a new trial.

Morgan's argument is without merit. Prior to sentencing, Judge Dorsey reviewed a lengthy presentence investigation report, sentencing memoranda submitted by both parties, and the full trial transcript, as well as the plea allocutions and sentencing transcripts of Morgan's accomplices. He was well equipped to rule on all the issues arising subsequent to trial. The plain language of Rule 25(b) makes the grant of a new trial discretionary in these circumstances. Judge Dorsey did not abuse his discretion in denying Morgan's motion for a new trial.

3. Double Jeopardy

Morgan renews his argument, previously raised by interlocutory appeal, that his prosecution is barred by the Double Jeopardy Clause because his prior civil settlement with OTS constitutes "punishment" barring further criminal prosecution. See United States v. Halper, 490 U.S. 435, 448-49, 109 S. Ct. 1892, 1902 (1989). Morgan argues that this court's prior decision rejecting his argument, see Morgan, 51 F.3d at 1115, should be reconsidered in light of the district court's finding of loss attributable to him under the sentencing guidelines.

Morgan misconstrues the nature of the Double Jeopardy inquiry under Halper. As we explained previously, "[a] defendant must make a threshold showing" that a prior sanction was "overwhelmingly disproportionate" to the amount the government suffered in damages and expenses "before a court undertakes a double jeopardy analysis" with respect to a subsequent prosecution. Morgan, 51 F.3d at 1115. The OTS settlement requiring Morgan to pay $1.8 million was based on OTS figures estimating a total loss of $2.275 million. The settlement payment was remedial, not punitive. Id.

Nor is there merit to Morgan's argument that the sentencing judge's finding of a $400,000 loss renders the earlier OTS sanction disproportionate. A finding of loss attributable under the sentencing guidelines does not purport to calculate the total amount of loss to the government caused by the defendant's conduct. It is limited to calculation of defined categories of loss caused by charged and "relevant" conduct, as defined under the guidelines. The district court's finding of loss under the guidelines for sentencing did not include several elements

that were considered by OTS in its determination of loss. For example, the district court's determination of $400,000 in loss was limited to the Buxton Farms down-payment. It excluded loss due to the Summer Street transaction because the conduct occurred prior to the applicability of the sentencing guidelines. It excluded loss due to the Lindale Manor project, which was included in the OTS's estimate. It excluded government loss attributable to the cost of investigation and enforcement. Morgan's argument compares apples to oranges. He fails to demonstrate that the OTS settlement was disproportionate and therefore punitive, rather than remedial.

4. Joinder

Morgan argues that under Fed. R. Crim. P. 8(a), the three transactions should not have been joined in a single trial. Rule 8(a) permits joinder of multiple offenses where they are "of the same or similar character." The government established that all three transactions were part of Morgan's plan to manipulate Charter Federal's real estate transactions in order to gain personal benefit and falsely inflate the bank's books. In all three transactions, Morgan used his position as bank president and CEO to plan and execute his schemes. Joinder was proper.

5. Suppression of Morgan's Testimony Before the OTS

Morgan argues that the district court erred in refusing to suppress his deposition testimony before the OTS in connection with its investigation of Charter Federal. He claims that his testimony was made in reasonable reliance on government assurances that he

would not be criminally prosecuted, and argues that fundamental fairness requires that his testimony be suppressed. See Fed. R. Crim. P. 2.

The contention is frivolous. Morgan claims that his decision to testify before the OTS was based on his reasonable reliance on several alleged statements by government officials: (1) a 1990 newspaper article quoting then-U.S. Attorney for the District of Connecticut Stanley A. Twardy, Jr., as stating, "Most, if not all, of these allegations [against Morgan] do not involve possible criminal wrongdoing. However, our investigation is not yet concluded."; (2) Twardy's alleged comment to Morgan's attorney (which Twardy denies) at the time of the article's publication that no criminal charges were forthcoming and the investigation would be closed "in a matter of days"; and, (3) a second newspaper article in which Twardy was quoted as saying that "no criminal charge will be filed."

Even assuming that Twardy made the comments attributed to him, Morgan could not reasonably have interpreted them as guarantees that no criminal charges would be brought against him, regardless what further investigation might reveal. At the outset of Morgan's deposition by the OTS, furthermore, he was advised that "the Office of Thrift Supervision may authorize other uses of documents or testimony obtained in this formal examination," and further cautioned that the OTS and its staff "routinely refer any evidence of known or suspected criminal acts to the Department of Justice. This is a matter of obligation and not discretion with the agency." Morgan

cannot reasonably have believed he had received a commitment of no prosecution from the U.S. Attorney.

Nor is Morgan's claim strengthened by his allegation that, had he known of the existence of an ongoing grand jury investigation, he would not have submitted to the deposition. Morgan's first deposition before the OTS occurred six weeks before the first grand jury subpoena was issued. Despite Morgan's vague accusations of governmental misconduct, there is no evidence that OTS was acting in any manner as an investigatory arm of the grand jury.

6. Ex Post Facto Clause

Morgan argues that the indictment should have been dismissed because the ten-year limitation period for bank fraud and misapplication of bank funds violates the ex post facto clause of the U.S. Constitution. At the time of the events leading to Morgan's conviction, the limitation period for his offenses required indictment within five years. In 1989, prior to the expiration of the original limitation period for Morgan's crimes, the limitation period was extended statutorily to ten years. Morgan argues that this constitutes unconstitutional retroactive punishment.

Morgan's claim is without merit. The long-standing rule in this circuit is that Congress has the power to extend the period of limitations without running afoul of the ex post facto clause, provided the original period has not already run. Falter v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928); see also United States v. Knipp, 963 F.2d 839, 844 (6th Cir. 1992) (applying Falter to reject

defendants' claim that extension of bank fraud statute of limitations violates ex post facto clause); United States v. Madia, 955 F.2d 538, 539-40 (8th Cir. 1992) (same). Because the original statute of limitations for Morgan's crimes had not expired at the time the limitations period was extended, Morgan's argument must be rejected.

7. Sentencing

Morgan argues that his sentence resulted from a misapplication of the sentencing guidelines. He challenges the district court's grant of a four-level enhancement for his role as an organizer or leader, disputes the upward enhancement of two points for obstruction of justice, and argues that he should have been given a three-point adjustment for acceptance of responsibility.

Morgan argues that the district court failed to make specific factual findings to support its conclusion that Morgan was the organizer or leader of criminal activity that involved at least five participants or was "otherwise extensive," as required for a four-level enhancement under U.S.S.G. § 3B1.1(a). Although the district court's findings regarding the "otherwise extensive" nature of Morgan's criminal activity might have been more detailed, they are sufficient to support the four-level role enhancement. The district court noted Morgan's position as the president and CEO of Charter Federal, which provided him with "unfettered discretion" to engage in duplicitous transactions, disburse prohibited commissions, and recruit others to carry out his scheme. This amply supported the conclusion that Morgan was a leader or organizer. The district court further explained that the complex and

carefully thought out nature of the criminal transactions -- including the use of falsified loan documents and draw-down requests in the 159 Franklin Street transactions, and the use of a forged broker of record form, a fraudulent waiver of commission, falsified invoices, forged checks, and falsified loan documents, in the 30 Buxton Farms Road transaction -- satisfied the requirement that the criminal activity be "otherwise extensive." The sentencing judge also noted the way Morgan carefully recruited various bank employees and third parties as confederates in his schemes "to front his activities," and attempted to minimize his own direct involvement. Finally, the multiple criminal aims motivating Morgan's actions, including his desire to line his own pockets as well as to falsely inflate the financial statements of Charter Federal to make the bank an attractive prospect for sale and secure substantial bonuses for himself, underscore the extensive nature of Morgan's criminal activities. In light of this evidence, the four-level enhancement for Morgan's role in the offense was within the sentencing judge's discretion.

Morgan also claims that he should not have received an upward enhancement of two points for obstruction of justice pursuant to U.S.S.G. § 3C1.1 for committing perjury at trial. At trial, Morgan denied all knowledge of Hoffman's use of $400,000 in development loan proceeds as the down payment in the Franklin Street transaction; similarly, he denied knowledge of the use of Egan as a straw man for payment of a $200,000 commission to Malloy in the Buxton Farms road transaction. The district court, based on its review of substantial contradictory testimony of other witnesses at trial and the jury's verdict, found Morgan's testimony "incredible." The district

court's conclusion that Morgan intended to obstruct justice by perjuring himself at trial was reasonable.

Finally, Morgan claims that he should have received a three-level adjustment for acceptance of responsibility because he entered into a civil settlement with the OTS of charges based on the same conduct underlying his criminal conviction. The most important factor in meriting an adjustment for acceptance of responsibility is "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct." U.S.S.G. § 3E1.1, Application Note 1(a). At all times, Morgan has denied factual guilt of the offenses charged and disclaimed any responsibility for wrongdoing. The sentencing court's denial of an adjustment for acceptance of responsibility was within its discretion. See United States v. Reyes, 9 F.3d 275, 279-81 (2d Cir. 1993).

B. GOVERNMENT'S ARGUMENTS ON APPEAL

1. Relevant Conduct

The government argues that the district court erred in refusing to consider the misapplication of bank funds in relation to the Summer Street transaction (the crime charged in count one) as "relevant conduct" for purposes of calculating the guidelines range for counts two through six of the indictment. The district court refused to include the conduct underlying count one in the guidelines calculations of "relevant conduct" under counts two through six because the count one conduct occurred pre-guidelines,

and Morgan received a consecutive sentence for his conviction on the count.

Where a defendant's guidelines range is based in part on conduct punished as part of a pre-guidelines count, there is a potential for impermissible double counting if the counts are sentenced consecutively. The U.S. Sentencing Commission has advised courts to "carefully fashion the sentence with these concerns in mind." United States Sentencing Commission, Most Frequently Asked Questions About the Sentencing Guidelines 41-42 (6th ed., Dec. 1992). One possible solution to this problem is to sentence concurrently; Judge Dorsey chose instead to sentence consecutively but to exclude the conduct underlying Count One for purposes of calculating relevant conduct under the guidelines range for counts two through six. The way in which Judge Dorsey avoided double counting was not an abuse of discretion.

2. Amount of Loss

The government argues that the district court erred in calculating the loss attributable to Morgan. The district court excluded from its calculation the amount of the defaulted loans in the Franklin Street transaction, $3.018 million, and included just the amount of the fraudulently obtained down payment, $400,000. The district court also refused to include the $200,000 in commission paid to Malloy through a straw man in the course of the Buxton Farms Road transaction. The conclusions reached by the sentencing judge in these matters depended upon assessment of the evidence and findings that were

reasonably within the powers of the district court. We find no error.

3. Enhancement for "More than Minimal Planning"

Finally, the government argues that the district court erred in refusing to enhance Morgan's sentence for "more than minimal planning" under U.S.S.G. § 2F1.1(b)(2) on the basis that it would constitute impermissible double counting in light of Morgan's enhancement under § 3B1.1 for his role as leader/organizer of the offense. In United States v. Greenfield, 44 F.3d 1141, 1146 (2d Cir. 1995), we explained that granting an enhancement under both § 3B1.1 (for role in the offense) and § 2F1.1(b)(2) (for more than minimal planning) would constitute impermissible double counting if both enhancements were based on the same conduct. The district court concluded that the same conduct would be the basis for both enhancements, and refused to impose the second. That assessment was reasonably within the sentencing court's power.

We have considered the other arguments made by the parties and find them to be without merit. The judgment of the district court is affirmed.

Relevant Excerpts Of The Transcript From
The Sentencing Hearing held before
The Honorable Peter C. Dorsey, U.S.D.J.
September 23, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

U.S.A.	:	3:93 cr 212
Plaintiff	:	
v.	:	
	:	New Haven,
MICHAEL G. MORGAN	:	September 23, 1996
Defendant	:	

SENTENCING
BEFORE THE HONORABLE PETER C. DORSEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Hartford, Connecticut 06106

Probation Officer: Michael Guglielmo

Proceedings recorded by electronic sound recording , transcript produced by transcription service.

p. 127, line 20 - p. 129, line 21

THE COURT:

I am going to find that the value of the loss for the purpose of Mr. Morgan's sentencing should be calculated no at three million two hundred and seventy-five or almost three million three hundred thousand dollars as calculated in the guidelines, a portion of the presentence report, because the loss resulting from Mr. Borarski's payment, which eventually went in bulk to Mr. Morgan, was not a loss that resulted from the criminal conduct in counts 2 through 6.

Secondly, the Malloy commission, while it is subject to a lot of question about the property of it, in point of fact, the actual payment as Mr. Malloy pleaded guilty to it and as made by the bank, was a payment that could have been construed as a proper commission and that the impropriety on Mr. Morgan's part, for which he stands convicted, lay in and lies now in the method by which the commission came to be established and paid in the records that were created to hide the actual time and legitimacy of the payment.

While it is very dubious, in the Court's mind, that the very limited activity by Mr. Malloy genuinely warranted a commission, in the looseness with which commissions are paid and were treated as payable in this instance, both by Mr. Malloy and the bank, although Mr. Morgan's honoring that payment is very dubious as a legal matter, I do not find that it constituted a loss resulting from criminal activity, which lay in the mechanics by which the payment was made.

Further, I find that with respect to the Franklin Street financing, that the loss has not been established by the Government as in the amount of three million eighteen thousand dollars as suggested in the Government's submission to the Probation Office in the preparation of the report nor here today. The loss, rather, would be the $400,000.00 that was wrongly loaned to Mr. Hoffman for the purpose of permitting him to have the full amount without a personal down payment of the purchase price.

While it may very well be that the bank, and then ultimately the RTC sustained a substantial loss with respect to that loan, there is no evidence that Mr. Morgan's criminal activity, for which he stands here convicted, that is under the charges of counts 5 and 6, actually brought about the loss. This is not to suggest that he didn't bring about the loss himself by his own conduct, by the exercise of dubious judgment and other motivations of an improper nature on his part. But the fact is that what he stands convicted of here, did not cause the bank the loss of the full amount of the loan, nor any specific amount that might eventually have been proven by the liquidation of that loan eventually by the RTC, which is not the evidence -- which is not the subject of evidence here.

Accordingly, with a $400,000.00 loan -- or loss rather, Mr. Morgan falls in the category of a -- is it 150 to $300,000.00, Mr. Guglielmo?

p. 130, line 15 - p. 131, line 17

THE COURT: Alright. I am going to enhance the role in the offense by four. And I do that not on the basis of the involvement of Mr. Borarski, but on the basis that what was involved here was a very substantial course of activity by Mr. Morgan who constituted the clear organizer and leader of criminal activity. That was extensive as far as the bank is concerned. It ultimately resulted in the transactions that were the subject of the testimony at trial in relation to the counts for which he stands convicted, that is 2 through 5, and --

MS. PEDERSEN: That's 2 through 6, Your Honor?

THE COURT: I'm sorry?

MS. PEDERSEN: 2 through 6?

THE COURT: 2 through 6, excuse me, I'm sorry. That's right, 2 through 6. And I think, therefore, having in mind all of the commentary that might be applied, and although he was not a supervisor of five or more participants, the course of conduct was extensive utilization of the other participants to accomplish the purposes, which the jury has found with respect to counts 2 through 6 to have been criminal, and, therefore, on the basis of the course of conduct that in its breath [sic], as far as the conduct of the business of the bank is concerned, although Mr. Morgan very carefully from the testimony, as I read it, attempted to use others to from his activities, his involvement was very substantial and, therefore, a four level increase is warranted.

District Court's Ruling On Motion To Dismiss
United States v. Morgan, 845 F. Supp. 934 (1994)

845 F. Supp. 934 (1994)

UNITED STATES of America, Plaintiff,
v.
Michael G. MORGAN, Defendant.

No. 3:93 CR 00212 (TFGD).

United States District Court,
D. Connecticut,
Waterbury Division.

Jan. 21, 1994.

Defendant, who was charged with misapplication of bank funds and bank fraud, moved to dismiss indictment. The District Court, Daly, J., held that: (1) defendant's civil settlement with Office of Thrift Supervision (OTS) was not "punishment" for purpose of double jeopardy clause; (2) defendant was not entitled to dismissal of indictment or disclosure of grand jury minutes based on his allegations of grand jury impropriety; and (3) Financial Institutions Reform and Recovery Act (FIRREA) provision extending statute of limitations for offenses affecting financial institutions did not violate ex post facto clause.

Motion denied.

Kari A. Pedersen, Asst. U.S. Atty., Office of U.S. Atty., Bridgeport, CT, for plaintiff.

Hope C. Seeley, Hubert J. Santos, Santos, Peck and Smith, Hartford, CT, for defendant.

RULING ON DEFENDANT'S MOTION TO DISMISS AND FOR DISCLOSURE OF GRAND JURY MINUTES

DALY, District Judge.

In this prosecution for misapplication of bank funds and bank fraud the defendant Michael G. Morgan ("Morgan") moves to dismiss the indictment, or a portion thereof, on three grounds. Morgan claims that the indictment (1) violates his Fifth Amendment right against double jeopardy; (2) relies on an unconstitutional ten-year statute of limitations period and exceeds the applicable five-year statute of limitations period; and (3) is the result of improper and excessive use of hearsay testimony. Morgan also claims that count one of the indictment should be dismissed because the grand jury was not adequately instructed regarding the elements of the crime of misapplication of bank funds, and moves for disclosure of the grand jury minutes to further substantiate these claims. For the reasons set forth below, the motion is denied in its entirety.

BACKGROUND

The instant indictment arises out of Morgan's alleged activities as President and Chief Executive Officer of Charter Federal Savings and Loan Association ("Charter"), a federal savings and loan institution that opened for business in May 1984. That same year Charter established the Bedford Equities Corporation ("BEC") for the purpose of developing real estate, and the Bedford Equities 1984

Limited Partnership ("BELP"), a real estate investment concern. BEC was the general partner of BELP. From its inception until August 1989 the qualifying deposits of Charter were insured by the Federal Savings and Loan Insurance Corporation ("FSLIC"), and the bank was under the regulatory jurisdiction of the Federal Home Loan Bank Board ("FHLBB"). The Office of Thrift Supervision ("OTS") assumed the interests of the FHLBB in August 1989, and in April 1990 the OTS informed Morgan that he was the subject of an investigation into the activities of Charter, BEC and BELP. On June 29, 1990 the OTS seized Charter's assets.

On January 19, 1993, and following a lengthy investigation, the OTS filed a "Notice of Charges and Hearing for an Order to Cease and Desist and to Direct Restitution and Other Affirmative Corrective Action and Notice of Intention to Prohibit" ("Notice") against Morgan. Because Morgan's first argument in the instant motion concerns the claim that the settlement constituted punishment for the same offense, the charges set forth in the Notice will be detailed here. The first charge of the Notice alleged that Morgan, as Charter's Chief Executive Officer and a member of Charter's Board, voted in favor of extending a $1,995,000 loan to BELP for the purchase of property at 1200 Summer Street ("Summer Street") in Stamford, Connecticut. The Notice alleges that Morgan supported the loan without disclosing to Charter, BEC or BELP that he would receive $67,500 of a $75,000 brokerage commission paid by BELP to Samuel Boyarsky ("Boyarsky"). The Notice charges that as a result Morgan was unjustly enriched and caused loss or other damage to BEC in the amount of $67,500.

The second charge of the Notice accused Morgan of various illegalities in the purchase of an office building at 30 Buxton Farms Road ("Buxton Farms") in Stamford. At Morgan's direction BEC purchased Buxton Farms in November 1985 for $10,270,000. Prior to that transaction William Malloy ("Malloy") suggested to Morgan that BEC sell the property to Arthur Beloff ("Beloff") and Sol Terkeltaub ("Terkeltaub") for $11,500,000. This sale occurred in September 1986, and Malloy allegedly received a brokerage commission of $200,000. Further, Beloff and Terkeltaub were able to purchase this property because they obtained $3,300,000 in unsecured loans from Charter, which classified them as consumer rather than commercial real estate loans. Had the loans been properly classified Charter would have exceeded the regulatory limit on commercial loans to individual borrowers. The false classification further allowed Charter and BEC to show a $1,700,000 pre-tax profit on the Buxton Farms transaction, without reflecting the fact that Charter had extended $3,300,000 in unsecured credit for the purchase. Beloff and Terkeltaub ultimately defaulted on their obligations to Charter and, pursuant to a workout agreement, Charter took title to Buxton Farms and forgave $2,900,000 of their debt. Beloff and Terkeltaub executed a promissory note to Charter in the amount of $1,420,000 for the balance, but failed to maintain payments. Charter as a result suffered a loss in excess of $1,000,000.

The third charge of the Notice alleges that Morgan, in addition to directing BEC to pay Malloy the $200,000 brokerage commission for the Buxton Farms transaction, directed that this fee improperly be deferred from 1986 to 1987 to improve Charter's balance sheet for fiscal year

1986. The payment was structured to appear as though it was part of a transaction for property located at 159 Franklin Street ("Franklin Street") in Stamford (outlined below), and was made through Brian Egan, a "straw" party, to disguise the actual payment to Malloy. The Notice further alleges that this payment was made to enable Malloy to satisfy two loans Charter made to him in 1986 and 1987.

The fourth charge of the Notice alleges that Morgan committed further improprieties in connection with the purchase and sale of the Franklin Street property. Specifically, the Notice alleges that BEC and BVD Affiliates sold the Franklin Street property to Burt Hoffman ("Hoffman") for $2,000,000. Simultaneous with and as part of this transaction, Charter loaned $3,475,000 to Hoffman at a favorable rate of interest, of which $1,600,000 was disbursed to fund a portion of the Franklin Street purchase price. Charter subsequently disbursed $450,000 to Hoffman for the balance on September 30, 1987. Charter records allegedly falsely stated that the purpose of the $450,000 disbursement was the development of other land previously purchased by Hoffman. The loan also allegedly violated federal regulations limiting the amount a bank may loan to an individual borrower for a single development project. Charter listed a gain of $713,000 on the sale of Franklin Street in its records, but as Hoffman defaulted on his loans Charter ultimately lost in excess of $1,000,000.

Morgan and the OTS settled all charges contained in the Notice on January 19, 1993. The Consent Order called for Morgan to pay the sum of $1,800,000, See Consent Order, ¶ 3(a), (b), to submit personal financial records on every

yearly anniversary of the Consent Order until the amounts set forth in ¶ 3 are paid, id. ¶¶ 4-6, 7, 8, and cease his participation in the affairs of financial institutions. Id. ¶¶ 2, 9.

The government brought the instant prosecution against Morgan on September 22, 1993 through the filing of a six-count indictment. The government concedes the indictment is based upon the conduct that formed the basis of the civil proceedings initiated by the OTS.[1] Morgan now moves to dismiss the indictment.

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[1] See Govt's Opp.Mem., 3. Count one of the indictment charges Morgan with misapplication of bank funds in connection with the Summer Street transaction, in violation of 18 U.S.C. § 657. Count two charges Morgan with bank fraud and aiding and abetting in connection with the Buxton Farms transaction, in violation of 18 U.S.C. §§ 1344 and 2, while count three charges Morgan with misapplication of bank funds and aiding and abetting through a $115,000 payment to a consultant in connection with the Summer Street and Buxton Farms transactions. Count four again charges Morgan with misapplication of bank funds and aiding and abetting through an $85,000 payment to a fictitious broker in connection with the Summer Street and Buxton Farms transactions, while count five charges Morgan with bank fraud and aiding and abetting in connection with the Franklin Street transaction. Finally, count six charges Morgan with misapplication of bank funds and aiding and abetting through the $400,000 disbursement to Hoffman in connection with the Franklin Street transaction.

DISCUSSION

I. Double Jeopardy Claim

Morgan first claims that the indictment violates his Fifth Amendment right to be free from double jeopardy. Morgan argues that the $1,800,000 settlement reached as a result of the OTS investigation constitutes punishment for conduct for which he cannot again be prosecuted. The double jeopardy clause of the Fifth Amendment provides that no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The double jeopardy clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. United States v. Halper, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989). Morgan seeks to invoke this third prohibition. The Court therefore must determine whether the Fifth Amendment prohibits the government from prosecuting Morgan for conduct that was the subject of the settlement with the OTS.

Morgan relies heavily on Halper, which involved a civil action following a criminal conviction. The defendant in Halper was convicted of submitting sixty-five false Medicare claims and was sentenced to two years' imprisonment and a fine of $5,000. The total amount of the loss to the government was $585. The government then brought a civil action under 31 U.S.C. § 3729, the civil false claims act, exposing Halper to a civil fine of $2,000 per count, or $130,000. The trial court imposed a $16,000 fine on Halper, holding that a greater fine would

constitute a second punishment under the Fifth Amendment. The Supreme Court agreed with this analysis, holding that "[w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." 490 U.S. at 449, 109 S.Ct. at 1902.[2] The Court limited this holding, however, to "the rare case ... where a fixed-penalty provision subjects a prolific but small- gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." Id.; see also United States v. Amiel, 995 F.2d 367, 369 (2d Cir.1993). Morgan argues that the terms of the OTS settlement constitute punishment under Halper for the conduct alleged in the Notice, and therefore the double jeopardy clause precludes any subsequent criminal indictment for that conduct.

As a preliminary matter, the government contends that the limited holding in Halper cannot extend to a criminal prosecution that follows a civil proceeding. See Govt's Opp. at 4-5. Although the Second Circuit has not addressed this issue directly, see Amiel, 995 F.2d at 370, decisions in other circuits have found that the sequence of the proceedings is immaterial to a Halper analysis. See, e.g., United States v. Sanchez-Escareno, 950 F.2d 193 (5th

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[2] Morgan concedes that an accounting is not necessary in this case. See Deft's Mem., 8.

Cir.1991) ("[T]he Halper principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding."); United States v. Mayers, 897 F.2d 1126, 1127 (11th Cir.) (per curiam) ("the Halper principle ... would seem to apply whether the civil penalties come before or after the criminal indictment"), cert. denied, 498 U.S. 865, 111 S.Ct. 178, 112 L.Ed.2d 142 (1990), appeal after remand, 957 F.2d 858 (11th. Cir.1992); see also United States v. Marcus Schloss & Co., Inc., 724 F.Supp. 1123 (S.D.N.Y.1989) ("If ... a civil sanction may fairly be characterized only as a deterrent or retribution ... then its exaction before imposition of criminal punishment should have the same double jeopardy effect as exaction afterwards."). The Court finds these decisions persuasive and applies the Halper analysis to this action.

Morgan's claim under Halper requires that the Court determine whether the OTS settlement constituted a prior punishment. Although "even remedial sanctions carry the sting of punishment," the Supreme Court cautioned against construing punishment from the perspective of the defendant. 490 U.S. at 447 n. 7, 109 S.Ct. at 1901 n. 7; see also Sanchez-Escareno, 950 F.2d at 202. Further, the labels "civil" and "criminal" are not of paramount importance. Rather, in determining whether a civil sanction constitutes criminal punishment, the Court must look to the purposes actually served by the sanction and not the underlying nature of the proceeding. Halper, 490 U.S. at 447 n. 7, 109 S.Ct. at 1901 n. 7. In short, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the purposes of retribution and deterrence, the twin goals of

punishment. Id. at 448, 109 S.Ct. at 1901. Civil sanctions, therefore, do not retain their civil character if they are used to attain these goals. United States v. Certain Real Property and Premises, 954 F.2d 29, 36 (2d Cir.1992). Halper thus requires the Court to determine whether the settlement amount agreed to by Morgan and the OTS is justified "by the civil and remedial purposes it ostensibly serve[d], or whether it or a portion thereof can be explained only with reference to punitive goals." Id.

An examination of the Stipulation and Consent to Issuance of Consent Order, the Consent Order, and the Consent Judgment entered into between Morgan and the OTS reveals that restitution and an agreement not to participate in the affairs of any financial institutions were the only goals of the OTS proceeding. See Stipulation and Consent to Issuance of Consent Order, ¶ 10 (The "Stipulation and Consent, the Order, [Morgan's] payment of restitution contemplated as part of the Order, and the forbearance of the OTS to initiate and maintain administrative proceedings against [Morgan] settle only the charges set forth in the Notice...."); id. at ¶ 12 (setting forth agreement that Morgan's "obligation to make the payment of restitution pursuant to the Stipulation and Consent and the Order" cannot be discharged in bankruptcy); see also Consent Order ¶ 3, 14 (setting forth agreement that Morgan's "obligation to reimburse against loss under paragraph 3 of this Order is his sole and separate obligation and will not be reduced by payments made to any other entity other than the OTS").

Although the Notice claimed that Charter sustained a loss in excess of $2,275,000, the Consent Judgment of $1,800,000 constituted a compromise concerning the amount of the Charter loss attributed to Morgan's actions. See Kenneth Cureton Affid., ¶ 8. The Stipulation and the Consent Order attribute no other basis for the settlement. Indeed, the settlement documents specifically provide that the "Stipulation and Consent, the Order, and [Morgan's] compliance with the Order, do not compromise, settle, dismiss, resolve, or in any way affect ... any civil or criminal claims, actions, or charges against or liability of [Morgan] or any other individual or entity asserted by any governmental entity other than the OTS." See Stipulation and Consent to Issuance of Consent Order, ¶ 11. As the OTS settlement was for remedial, not punitive purposes, and as Morgan was aware that the settlement did not extinguish the possibility of subsequent criminal prosecution, the settlement does not constitute punishment within the context of the Fifth Amendment. Accordingly, to the extent the instant motion asserts a claim under the double jeopardy clause, it is hereby denied.

II. Grand Jury Improprieties Claims

Morgan next moves to dismiss count one of the indictment on the ground the grand jury was not properly instructed on the elements of the crime of misapplication of bank funds, and further argues that the entire indictment should be dismissed because the government improperly relied on excessive hearsay during the grand jury proceedings. Morgan requests disclosure of the grand jury

minutes, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(C)(ii), in furtherance of these claims.[3]

A. Insufficient Instructions

Morgan must support his claim by setting forth specific facts in order to obtain disclosure of the grand jury minutes under Rule 6(e)(3)(C)(ii). See United States v. Abcasis, 785 F.Supp. 1113, 1119 (S.D.N.Y.1992). Morgan also must overcome the strong presumption of regularity in grand jury proceedings, a presumption that cannot be outweighed by conclusory or speculative allegations of misconduct. Id.; see also Hamling v. United States, 418 U.S. 87, 139 n. 23, 94 S.Ct. 2887, 2918 n. 23, 41 L.Ed.2d 590 (1974); United States v. Santoro, 647 F.Supp. 153, 173 (E.D.N.Y.1986). Disclosure thus will be denied in all but extraordinary circumstances. Costello v. United States, 350 U.S. 359, 364, 76 S.Ct. 406, 409, 100 L.Ed. 397 (1956).

Morgan first seeks disclosure in support of his motion to dismiss count one, which charges him with misapplication of bank funds in connection with the Summer Street transaction. Morgan claims that the government failed to instruct the grand jury correctly on the element of intent when seeking an indictment on this

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[3] Rule 6(e)(3)(C)(ii) provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made ... (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed.R.Crim.P. 6(e)(3)(C)(ii).

count. The applicable statute provides that "[w]hoever, being an officer, agent or employee of or connected in any capacity with ... [a] savings and loan corporation ..., embezzles, abstracts, purloins or willfully misapplies any monies, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care" shall be guilty of a felony. 18 U.S.C. § 657. The government must prove four elements to establish a violation of this statute: (1) that the defendant is an officer, agent or employee of the bank; (2) that the deposits of the bank are insured by the Federal Deposit Insurance Corporation; (3) that the defendant knowingly and willfully misapplied the funds of the bank; and (4) that the defendant acted with the intent to injure or defraud the bank. See United States v. Castiglia, 894 F.2d 533 (2d Cir.1990); United States v. Clark, 765 F.2d 297 (2d Cir.1985).[4] Thus although section 657 does not specify an intent requirement, the Second Circuit has long held that intent is a necessary element of the offense. Clark, 765 F.2d at 302; United States v. Docherty, 468 F.2d 989 (2d Cir.1972). The element is met if the bank officer intends that his conduct subject the bank to some risk of pecuniary loss, Clark, 765 F.2d at 303, or if the natural effect of the officer's conduct put the bank in jeopardy of loss, regardless of whether such loss actually occurs. Castiglia, 894 F.2d at 537-38.

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[4] Though Clark involves the interpretation of 18 U.S.C. § 656, the elements under the 18 U.S.C. § 657 are the same. See United States v. Davis, 953 F.2d 1482, 1492-93 n. 15 (10th Cir.1992); United States v. Musacchio, 940 F.2d 486, 491 n. 6 (9th Cir.1991).

Morgan claims that the $75,000 brokerage commission paid to Boyarsky for the Summer Street transaction came from the funds of BELP, not Charter. He contends that his actions were never intended to place Charter at pecuniary risk, and indeed had no such effect, and thus the necessary element of intent was not met. He therefore asserts that a properly instructed grand jury never could have returned an indictment on count one.

This claim fails, however, for two reasons. First, the risk of loss and the source of the funds from which Boyarsky was paid are factual issues properly left for determination by a jury at trial. Second, it is well settled that an indictment returned by a legally constituted grand jury, if valid on its face, is sufficient to call for a trial on the merits. Costello, 350 U.S. at 363, 76 S.Ct. at 408; Abcasis, 785 F.Supp. at 1119. Morgan's claim fails to overcome the strong presumption of regularity in grand jury proceedings and thus, to the extent his motion seeks to dismiss count one, and seeks disclosure of the grand jury minutes pertaining to that count, it is hereby denied.

B. Excessive Use of Hearsay

Morgan next moves to dismiss the indictment on the ground that the government improperly relied on excessive hearsay in obtaining the indictment. Morgan asserts that evidence first was presented to a grand jury in 1990, yet a grand jury did not return an indictment until September 1993, evidencing the fact that more than one grand jury was impaneled. Morgan also requests disclosure of the grand jury minutes, pursuant to Rule 6(e)(3)(C)(ii), in furtherance of this claim.

Although there is no prohibition on the use of hearsay evidence in grand jury proceedings, extensive reliance on hearsay testimony is disfavored. United States v. Hogan, 712 F.2d 757, 761 (2d Cir.1983); see also United States v. Estepa, 471 F.2d 1132 (2d Cir.1972); United States v. Liebowitz, 420 F.2d 39 (2d Cir.1969). Nonetheless, a grand jury may base its indictment wholly upon hearsay, and dismissal is required only when necessary to protect the integrity of the judicial process. Liebowitz, 420 F.2d at 42. This may result if the defendant can show that there is a "high probability" that an indictment would not have been returned had the indictment been based on direct evidence rather than on hearsay. Id.

Morgan's claim amounts only to conjecture that the delay between the beginning of the grand jury process and the return of the indictment necessitated the use of hearsay evidence. Morgan has not alleged with specificity, however, any facts on which the Court could find that there existed a "high probability" that the indictment would not have been returned had it not been based on hearsay. This argument therefore also fails to overcome the presumption of regularity in grand jury proceedings, and accordingly his motion to dismiss the indictment and for disclosure of grand jury minutes on this ground is denied.

III. Ex Post Facto Claim

Morgan next claims that the indictment must be dismissed because it violates the ex post facto clause of

Article I, Section 9 of the United States Constitution.[5] Specifically, Morgan claims that a ten-year statute of limitations, passed subsequent to the crimes alleged in the indictment, cannot constitutionally be applied to him because the indictment was returned after the end of the original five-year limitations period.[6] The Financial Institution Reform and Recovery Act ("FIRREA"), which became effective on August 9, 1989, extended the statute of limitations for various offenses affecting financial

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[5] The ex post facto clause provides that "[n]o Bill of Attainder or Ex Post Facto Law shall be passed." U.S. Const. Art. I, § 9. An ex post facto law is one which punishes an act previously committed which was innocent when done; or which makes the punishment of a crime more burdensome after its commission; or which deprives a person charged with a crime of any defense which was available according to law at the time the offense was committed. See Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925).

[6] The date of the crime with which Morgan is charged in count one is October 25, 1984; in count two, June 1988; in count three, December 15, 1987; in count four, June 10, 1988; in count five, June 30, 1988; and in count six, September 29, 1987. Thus, to be timely under the five-year statute of limitations, the indictment had to have been returned in this case by October 25, 1989 on count one; by June 30, 1993 on count two; by December 15, 1992 on count three; by June 10, 1993 on count four; by June 30, 1993 on count five; and by September 29, 1992 on count six. The indictment in the instant case actually was returned on September 22, 1993. Hence the indictment exceeds a five-year limitations period on all counts.

institutions from five to ten years.[7] Further, Public Law 101-73 provides that "the amendments made by [subsection (a) of FIRREA] shall apply to an offense committed before the effective date of this section, if the statute of limitations applicable to that offense under this chapter had not run as of such date." Pub.L. No. 101- 73, § 961(l)(3).

While the Second Circuit has not ruled directly on the constitutionality of this amendment, courts in other circuits have found the amendment valid. See United States v. Brechtel, 997 F.2d 1108 (5th Cir.1992); United States v. Madia, 955 F.2d 538, 540 (8th Cir.1992); United States v. Taliaferro, 979 F.2d 1399, 1402 (10th Cir.1992). Morgan, however, urges the Court to apply the Supreme Court's holding in Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925). The Beazell Court held that "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to the law at the time when the act was committed, is prohibited as Ex Post Facto." 269 U.S. at 169-70, 46 S.Ct. at 68. The ex post facto clause thus only prohibits enactment of statutes that (1) criminalize an act previously committed that was innocent when committed; (2) enhance the penalties for a crime after its commission; or (3) deprive a defendant of any defense available according to law when the act was

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[7] FIRREA provides that "[n]o person shall be prosecuted, tried, or punished for a violation of ... [18 U.S.C. §§] 657 [or] 1344 ... unless the indictment is returned or the information is filed within 10 years after the commission of the offense." See 18 U.S.C. § 3293.

committed. Brechtel, 997 F.2d at 1113 (citing Collins v. Youngblood, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30 (1990)). Morgan argues that the third circumstance exists in the instant case, as the enactment of the ten-year limitations period set forth in FIRREA deprives him of the defense that the grand jury returned the indictment after the expiration of the five-year limitations period previously in effect.

Morgan's reliance on Beazell is misplaced, however, as his argument ignores the Supreme Court's decision in Collins. In Collins the Court clarified the Beazell Court's description of a "defense available ... at the time when the act was committed," holding that this defense was "linked to the prohibition on alterations in 'the legal definition of the offense' or 'the nature or amount of the punishment imposed for its commission.' " Id. at 41, 110 S.Ct. at 2718. Thus only statutes that withdraw defenses relating to the definition of a crime, or that involve matters that a defendant might plead as justification or excuse, fall into this latter group. See id.; see also Brechtel, 997 F.2d at 1113. An extension of the statute of limitations period neither criminalizes previously innocent conduct nor enhances the punishment for an existing crime, and therefore Beazell does not apply. See Brechtel, 997 F.2d at 1113 (citing Collins, 497 U.S. at 41, 110 S.Ct. at 2718).

This interpretation is in accord with the principles set forth in Falter v. United States, 23 F.2d 420 (2d Cir.), cert. denied, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1925). In Falter, Judge Learned Hand held that "Congress ... has the power to extend the period of limitations without

running afoul of the Ex Post Facto Clause, provided the [original] period has not already run." Id. at 425-26. The Fifth Circuit in Brechtel, and the courts of other circuits that have addressed this issue directly, relied on Judge Hand's decision in Falter in finding the amendment in 18 U.S.C. § 3293 to not violate the ex post facto clause. See Brechtel, 997 F.2d at 1113, n. 7; Madia, 955 F.2d at 540; Taliaferro, 979 F.2d at 1402.

As noted above, the grand jury returned the indictment in the instant case on September 22, 1993. As Congress enacted the limitations period in 18 U.S.C. § 3293 on August 9, 1989, two months prior to October 25, 1989, the earliest applicable expiration date of the original five-year limitations period, the ten-year limitations period set forth in FIRREA does not violate the ex post facto clause. Accordingly, Morgan's motion to dismiss the indictment on this ground also is denied.

CONCLUSION

For the reasons stated above, the defendant's motion to dismiss the indictment and for disclosure of the grand jury minutes is hereby DENIED.

SO ORDERED.

The Opinion of the Court of Appeals
For The Second Circuit
(Interlocutory Appeal)
United States v. Morgan, 51 F.3d 1105 (1995)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 298—August Term 1994

(Argued November 8, 1994 Decided April 3, 1995)

Docket No. 94-1121

UNITED STATES OF AMERICA,

Appellee,

—v.—

MICHAEL G. MORGAN,

Defendant-Appellant.

Before:

FEINBERG, KEARSE, and CARDAMONE,

Circuit Judges.

Michael G. Morgan appeals from an order entered in the United States District Court for the District of Connecticut (Daly, J.) on January 21, 1994 denying his

motion to dismiss on double jeopardy grounds an indictment returned against him on September 22, 1993.

Affirmed.

HUBERT J. SANTOS, Hartford, Connecticut (Hope C. Seeley, Santos, Peck & Smith, P.C., Hartford, Connecticut, of counsel), *for Appellant.*

KARI A. PEDERSEN, Assistant United States Attorney, Bridgeport, Connecticut (Christopher F. Droney, United States Attorney, District of Connecticut, New Haven, Connecticut, of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge*:

Michael G. Morgan takes this interlocutory appeal from the denial of a motion to dismiss a pending indictment against him entered in the United States District Court for the District of Connecticut on January 21, 1994, before Judge T.F. Gilroy Daly. The appeal raises a question as to whether defendant's constitutional right against being twice put in jeopardy for the same offense was violated. Having signed a consent judgment respecting civil charges brought against him, Morgan now maintains that $1.5 million of the restitution payments imposed on him by the settlement, which sum the con-

sent order labeled a "personal obligation," was in essence a punitive civil sanction precluding the government from later indicting him.

The key word to be understood on this appeal is "punishment." If a person is twice subject to punishment for the same offense, double jeopardy protection attaches. It is our task to determine whether the heavy repayment obligations imposed here do or do not constitute punishment; if they do not, the double jeopardy defense has no application. The Supreme Court gives guidance when it tells us that a civil sanction constitutes punishment when the goal it serves is for purposes of deterrence or retribution. Such goal is evidenced when the sanction is overwhelmingly disproportionate to the damages caused. *See United States v. Halper*, 490 U.S. 435, 448-49 (1989). Thus, an overwhelmingly disproportionate sanction may be present where the civil sanction bears so little relationship to making the government whole as to shock the conscience of the court.

In this case, because there has been no showing of an overwhelmingly disproportionate sanction, the criminal prosecution of Morgan does not offend the Double Jeopardy Clause.

BACKGROUND

Appellant Morgan was a founder, the chief executive officer, and a member of the Board of Directors of Charter Federal Savings and Loan Association (Charter Federal or bank) organized in 1984 and located in Stamford, Connecticut. The bank created a wholly-owned subsidiary called Bedford Equities Corporation to acquire real estate for development purposes. Bedford Equities,

the development corporation, was a general partner of a limited partnership called Bedford Equities 1984 Limited Partnership that syndicated real estate acquired by Bedford Equities Corporation. Among the real estate purchases made by Bedford Equities Corporation were three Stamford properties: 1200 Summer Street, 30 Buxton Farms Road, and 159 Franklin Street.

The Resolution Trust Corporation seized Charter Federal in 1990. Following the seizure, the United States Department of the Treasury's Office of Thrift Supervision (OTS) began an investigation into the activities of certain of the bank's officers and directors. This investigation culminated on January 19, 1993 with the filing against Morgan of a Notice of Charges pursuant to 12 U.S.C. § 1818(b). Simultaneously with the filing of this Notice, there were also filed a stipulation of settlement between Morgan and the government, and a consent order and consent judgment with respect to the claims contained in the civil charges.

The five charges in the Notice involved Morgan's role in four separate real estate transactions during the period 1984-1987. Charge one alleged that when voting to finance Bedford Equities' purchase of 1200 Summer Street, he hid his $67,500 commission on the transaction by the use of a "straw" broker; charge two asserted that in improperly structuring bank financing for the sale of 30 Buxton Farms Road so as to show a false profit, Morgan falsely inflated Charter Federal's income and caused it to lose in excess of $1 million dollars when the purchasers defaulted; charge three involved the same Buxton Farms Road property and charged Morgan with paying another bank director, again through a "straw" broker, a $200,000 commission. It was further asserted in this charge that to improve Charter Federal's books

the payment was ostensibly waived, but in fact was later siphoned into the board member's pocket, disguised as part of a payment to the same "straw" broker on the 159 Franklin Street sale. Count four charged Morgan with falsely structuring the sale of 159 Franklin Street to meet the criteria for profit recognition by disguising a $450,000 loan as for "development" of the property when in fact the loan was used as a down payment on the purchase of the property. The fourth charge claimed loss and other damage to the bank of over $1 million on this transaction. The fifth and final charge involved Lindale Manor, a condominium complex owned by Lindale Partners. It alleged that Morgan caused Charter Federal to make loans to Lindale Partners, a partnership in which he held a one-third interest. Because this conduct was not reflected in the pending indictment, it is not a subject of this appeal. In sum, based upon the first four counts of the Notice, Morgan was charged in all with causing Charter Federal to incur losses in excess of $2,275,000.

Simultaneously with the issuance of the formal Notice of the charges just related, the government notified Morgan pursuant to 12 U.S.C. § 1818(b) that the OTS intended to prohibit him from participating in the conduct of the business of any federally insured depository institution. All of the civil claims the OTS had against Morgan were settled through the execution of the earlier referred to stipulation, consent order and consent judgment.

Under the settlement, Morgan neither admitted nor denied the charges made against him. Pursuant to the settlement agreement, he signed a consent judgment that ordered him to pay $300,000 as restitution to OTS. Under the terms of the consent order, he agreed to pay

$1.5 million to OTS in addition to the $300,000 imposed by the consent judgment. Both sums were to be repaid according to an agreed-upon payment schedule that was made contingent on the extent of Morgan's future gross income. OTS agreed to refrain from executing the judgment so long as the payment schedule was complied with. Morgan has to date made no payments under the settlement.

The relevant portion of the consent order reads:

> *RESTITUTION*
>
> 3. Based upon his sworn statement of financial condition and other relevant factors . . . :
>
> a. RESPONDENT shall execute the annexed consent judgment in the amount of $300,000 *to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations* of law, regulations and rules set forth against the RESPONDENT in the NOTICE. . . .
>
> b. In addition to the judgment, RESPONDENT also agrees to pay the further sum of $1,500,000 pursuant to the schedule set forth in Subparagraph 3.c. *This payment obligation is a personal obligation of the RESPONDENT* and upon his death will not be an obligation of his estate.

(Consent Order at 2-3) (emphasis added). The stipulation provides that:

> 11. This STIPULATION and CONSENT, the ORDER, and RESPONDENT'S compliance with the ORDER, do not compromise, settle, dismiss, resolve, or in any way affect:

> b. any civil or criminal claims, actions, or charges against or liability of RESPONDENT or any other individual or entity asserted by any governmental entity other than the OTS.

(Stipulation at 5).

In September 1993, eight months after the execution of the settlement documents, a Connecticut federal grand jury returned a six-count indictment against Morgan, charging him with two counts of bank fraud, in violation of 18 U.S.C. § 1344, and four counts of misapplying bank funds, in violation of 18 U.S.C. § 657. The charges stem from appellant's alleged misapplication of bank funds with respect to the Summer Street transaction, and his alleged scheme to defraud the bank with respect to the sales of the Buxton Farms Road and Franklin Street properties. All the criminal charges set forth in the indictment stem from the same events addressed by the January 19, 1993 civil Notice of Charges.

Morgan promptly moved to dismiss the indictment as violative of his Fifth Amendment right against double jeopardy. Upon Judge Daly's denial of the motion, Morgan brought this interlocutory appeal. We affirm.

DISCUSSION

Before considering whether the indictment places defendant Morgan twice in jeopardy for the same offense, we note that this interlocutory appeal from a denial of a motion to dismiss on double jeopardy grounds is within the collateral order exception to the rule that appeals may be taken only from final judgments. *See Abney v. United States*, 431 U.S. 651, 659 (1977); *United States v. Amiel*, 995 F.2d 367, 369 (2d

Cir. 1993); *United States v. Helmsley*, 864 F.2d 266, 268 (2d Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989). Further, because a motion to dismiss on double jeopardy grounds presents a question of law, we review it *de novo*. *See United States v. Botello*, 991 F.2d 189, 192 (5th Cir. 1993) (review of denial by district court of motion to dismiss indictment on double jeopardy grounds is *de novo*), *cert. denied*, 114 S. Ct. 886 (1994). We turn to the merits.

I Double Jeopardy Waiver

Analysis turns first to whether appellant waived his right to assert a double jeopardy defense to the indictment laid against him. Morgan contends the district court determined in essence that when he entered into the stipulation, consented to the issuance of the order, and signed the consent judgment, he was aware of the possibility of subsequent criminal prosecution, and therefore waived this defense. Although no explicit finding of such a waiver was made, the district judge did point to that language in the settlement documents which stated that Morgan's compliance with the terms of the settlement did not settle, dismiss or resolve or affect in any way any "criminal claims, actions, or charges" asserted by the government against Morgan.

The government believes this language evidences appellant's recognition at the time he executed the settlement documents of the pending criminal investigation. There is no doubt Morgan was aware the United States Attorney's office had been investigating him since 1990. But Morgan does not believe the language of the civil settlement can be construed, following his indictment, as a waiver of his right to raise a double jeopardy defense.

He maintains the cited language simply preserves for the government its right to institute further proceedings against him.

In *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994), upon which Morgan heavily relies, the Tenth Circuit held that since a waiver of a constitutional right must be knowing and intelligent, a consent order signed by appellants was too vaguely worded to prevent them from asserting a double jeopardy claim. The order read: "[N]othing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States . . . to bring other actions . . . ." *Id.* at 539. This purported waiver was held ineffective because it did not explicitly state that appellants waived their right to assert a double jeopardy defense were such actions brought. *Id.*

A waiver of a constitutional right must be voluntary, knowing and intelligent, that is, the act of waiver must be shown to have been done with awareness of its consequences. *See Brady v. United States*, 397 U.S. 742, 748 (1970). In examining a purported waiver of the double jeopardy right, we must draw all reasonable presumptions against the loss of such a right. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The purported waiver in Morgan's stipulation did not *explicitly* recognize the renouncement of a double jeopardy defense against future criminal proceedings. *See Hudson*, 14 F.3d at 539. It would have been easy enough for such language to be included in the consent order. In fact, Morgan points out that subsequent consent orders drafted by the OTS—set forth in his reply brief—have included such a specific double jeopardy waiver.

Morgan's conceded knowledge that a criminal investigation was pending against him when he signed the stipulation may not, standing alone, establish that he made a knowing and intelligent waiver of his constitutional right to assert a double jeopardy defense. Because the settlement did not contain language expressly stating that Morgan would be barred from asserting this defense in future criminal proceedings, it could not operate as an effective waiver of Morgan's constitutional right. Were the rule otherwise, the government, when entering into a civil settlement, could safely prevent any double jeopardy defense being raised in a later criminal proceeding simply by advising the putative defendant of the existence of a criminal investigation against him. We reject the notion that a constitutional right may be waived in such an implied fashion.

II Double Jeopardy

A. *History of the Concept*

Analysis turns next to the merits of the motion to dismiss. But before engaging in that discussion, it is useful for purposes of that analysis to make a somewhat detailed examination of the historical development of the Double Jeopardy Clause. That Clause found in the Fifth Amendment to the United States Constitution states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The phrase "life or limb" has a quaintly archaic ring—striking the ear somewhat oddly, perhaps, in its application to a civil sanctions case—yet resonating profoundly with its historical origins.

While the concept of double jeopardy first emerged in the English common law nearly seven hundred years before its adoption in the United States Constitution's Bill of Rights, its roots lie even deeper in antiquity. Known to the Greeks and Romans, *see Benton v. Maryland*, 395 U.S. 784, 795 (1969), the notion of double jeopardy is found in the *Digest of Justinian* promulgated in the year 533, *see* Barry Nicholas, *An Introduction to Roman Law* 48 (Oxford Univ. Press 1962). There the concept is expressed as "The governor should not permit the same person to be again accused of a crime of which he had been acquitted." Jay A. Sigler, *Double Jeopardy: The Development of a Legal and Social Policy* 2 (Cornell Univ. Press 1969) (quoting the *Digest of Justinian*, Bk. 48, Title 2, n.7). The canon law had also long recognized that even God does not punish twice for the same act. *See Bartkus v. Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J. dissenting).

These early civil and canon law roots from which, over the centuries, the modern notion of double jeopardy grew began to be evident in the common law of England during the twelfth-century reign of King Henry I (1100-1135), when the need for double jeopardy protection was particularly marked because punishment upon a second conviction for almost any offense was death or mutilation. Hence, the historical derivation of the Fifth Amendment phrase "in jeopardy of life or limb" is from a gruesomely literal source. *See* Sigler, *Double Jeopardy* at 4-5.

The doctrine gained a more secure foothold in the common law during the reign of King Henry II (1135-89), arising out of the king's close relationship to Thomas à Becket, his Lord Chancellor and later Archbishop of Canterbury. Becket, using his high church

office, challenged Henry II's Clarendon Articles, which made the clergy, already subject to trial and punishment in ecclesiastical courts, subject also to being convened before lay judges. *See* Sir Matthew Hale, *The History of the Common Law of England* (Univ. of Chicago Press 1971). The controversy between the two erstwhile friends resulted in Becket's murder, and his subsequent canonization. But in 1176 Henry II conceded St. Thomas' point that "no man ought to be punished twice for the same offense," thereby firmly fixing the notion of no double punishment in the common law. *See* Martin L. Friedland, *Double Jeopardy* 5 (Oxford Univ. Press 1969).

The important aspect of the rule that for modern day purposes limits the sovereign's power to prosecute did not become a feature of double jeopardy in England until the end of the thirteenth century. Prior to that time criminal prosecution frequently depended on suits by private persons. The practice of initiating criminal prosecution by private appeal was a survival of Anglo-Saxon law, and was not wholly abolished in England until 1819. Sigler, *Double Jeopardy* at 8; Friedland, *Double Jeopardy* at 8. During the thirteenth century indictments by the Crown existed in parallel with private prosecutions. Sigler, *Double Jeopardy* at 8. A judgment of acquittal or conviction in a suit brought by a private person barred that person's further suit, and judgment on an indictment by the Crown barred further suit by the Crown. But double jeopardy principles did not prevent the Crown from bringing further suit in cases where a private person's suit had resulted in an acquittal. By the fifteenth century acquittal on a private appeal, after trial by jury, barred indictment by the Crown, and an acquittal on an indictment, generally barred further prosecution for the same

offense by appeal. *See* Friedland, *Double Jeopardy* at 8-9. Thus, the right of private appeal fell into disuse, and repeated prosecution for the same crime began to be eliminated. Sigler, *Double Jeopardy* at 8-9.

The two English common law commentators who most influenced colonial American jurisprudence were Sir Edward Coke and Sir William Blackstone. Blackstone in his Commentaries penned the oft-quoted statement: "The plea of *autrefois acquit*,[1] for a former acquittal, is grounded on the universal maxim . . . that no man is to be brought into jeopardy of his life, more than once, for the same offense." 4 William Blackstone, *Commentaries on the Laws of England* 329 (Univ. of Chicago Press 1979). During the seventeenth century when Coke's writings appeared, double jeopardy began to assume the outline of its present form. *See* Friedland, *Double Jeopardy* at 11. Yet even in the writings of Coke and Blackstone the protection is narrower than in contemporary American doctrine. Sigler, *Double Jeopardy* at 16-17. Coke believed that double jeopardy was not an absolute, but a conditional protection, depending on the quality of the prior acquittal. *Id.* at 18. Blackstone noted that the concept was limited to felonies, and that for the doctrine to apply there was a requirement for either a guilty verdict or an acquittal. *Id.* at 20.

That double jeopardy in America is a more fundamental right than in England may be traced back to early colonial times. The Massachusetts Bay Colony extended its protection to *all* criminal prosecutions and to civil

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[1] The Supreme Court tells us double jeopardy was historically understood as embracing three common-law pleas—*autrefois acquit*, *autrefois convict*, and pardon—that barred the retrial for the same offense for which defendant had already been acquitted, convicted, or pardoned. *See United States v. Scott*, 437 U.S. 82, 87 (1978).

trespass as well. In New England's first established code of laws, the *Body of Liberties*, that Colony provided: "No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse." *The Massachusetts "Body of Liberties", No. 42, in American Historical Documents, 1000-1904*, at 70, 77 (Harvard Classics ed., P.F. Collier & Son 1910). James Madison, who fathered the doctrine in the Bill of Rights (1791), proposed that it read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." *See* Friedland, *Double Jeopardy* at 28, 30. The Supreme Court later stated as a settled principle of the common law that no person may be twice punished in the same court on the same facts, for the same offense, or "as Coke has it, '*Nemo debet bis puniri pro uno delicto.*' No one can be twice punished for the same crime or misdemeanor . . . ." *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1873).

B. *Modern Jurisprudence*

With this historical background in mind, we address the modern jurisprudence of the doctrine. Today, as its long history makes clear, the Double Jeopardy Clause protects an individual against multiple punishments for the same offense. *See Halper*, 490 U.S. at 440. In modern American law the punishment in question need not be death, maiming or mutilation; nor need the offense be a capital crime or even a felony. The American concept is more generous. It is viewed as an inherent part of our fundamental freedoms that a person accused of any offense, having once suffered punishment, once been convicted, or once won acquittal, is forever immune from further prosecution for that same offense.

Because the concept is so broad, the Supreme Court has held that it applies even to certain fines. A civil sanction may constitute "punishment" for double jeopardy purposes where the sanction is "overwhelmingly disproportionate" to the damages the defendant caused. *See id.* at 449. In such a case, the civil sanction serves not a remedial, but rather a deterrent or retributory function. *Id. Halper*'s test for assessing the nature of civil sanctions is a "rule of reason." *See United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 34 (2d Cir.), *cert. denied sub nom. Levin v. United States*, 113 S. Ct. 55 (1992).

The double jeopardy inquiry is not concerned with the label of a sanction, but only with whether the characteristics of the sanction are punitive in nature, that is, what purpose they serve. *See Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) (tax sanction constituted impermissible second punishment where not rationally related to damages suffered by the government). Thus, we have held that *Halper* does not apply to forfeiture claims. *See United States v. United States Currency in the Amount of $145,139*, 18 F.3d 73, 74-75 (2d Cir.) (the *res* itself, in this case, the money being the culprit, a criminal proceeding *in personam* cannot affect it), *cert. denied sub nom. Etim v. United States*, 115 S. Ct. 72 (1994); *accord United States v. Torres*, 28 F.3d 1463, 1465-66 (7th Cir.), *cert. denied*, 115 S. Ct. 669 (1994); *but see United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1221-22 (9th Cir. 1994). Defining *Halper* narrowly, we have also declined to apply it to prison disciplinary sanctions, *see United States v. Hernandez-Fundora*, ___ F.3d ___, 1995 WL 62811, at *4 (2d Cir. Feb. 14, 1995) (disciplinary sanctions not punishment where not "grossly dispro-

portionate to the remedial goal of maintaining order and discipline in the prison"); *accord United States v. Newby*, 11 F.3d 1143, 1145-46 (3d Cir. 1993), *cert. denied*, 115 S. Ct. 111 (1994), and to civil contempt fines, *see United States v. Mongelli*, 2 F.3d 29, 30 (2d Cir. 1993) (per curiam) (civil contempt fines of $10,000 per day were coercive and not punitive in nature and therefore not subject to double jeopardy claims under *Halper*).

Where there is no showing of an intent to punish, a court must examine the sanction to see if it serves a legitimate nonpunitive government purpose. *See Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979). A line is drawn because civil actions instituted to remedy or recoup financial losses the government has suffered, on the one side, and actions taken to achieve retribution or deterrence in order to uphold public justice, on the other side, are separate and distinct. Unless a sanction serves solely remedial purposes, it must be characterized as punishment. *See United States v. 38 Whalers Cove Drive*, 954 F.2d at 35. While both criminal and civil punishments may lawfully be provided by Congress for the same conduct, it is only the government's action to punish the same conduct on two separate occasions that subjects a defendant to double jeopardy. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943).

III Merits of Double Jeopardy Defense

A. *Preliminary Issues*

We pass now to a discussion of the merits. The Double Jeopardy Clause protects a person from prosecution for the same offense following either an acquittal or a con-

viction, and it protects also against multiple punishments for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Morgan cannot claim prosecution for the same offense arising after an acquittal or conviction because the initial civil proceeding did not result in either. Instead, Morgan avers he is being subjected to multiple punishments for the same offense, citing *Halper*, 490 U.S. at 440.

Before applying the *Halper* analysis to the facts of the instant case, there are two preliminary questions to be addressed. First, the government suggests that appellant's reliance on *Halper* is entirely misplaced because there, contrary to the facts of the instant case, the criminal trial and conviction preceded the attempted imposition of civil penalties for the same conduct. Other circuits have ruled that *Halper* applies when the civil sanction precedes the criminal prosecution. *See, e.g.*, *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994); *United States v. Sanchez-Escareno*, 950 F.2d 193, 199 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 123 (1992); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir.), *cert. denied*, 498 U.S. 865 (1990). We have not explicitly so ruled. *See United States v. Amiel*, 995 F.2d at 370. The district court, persuaded by the reasoning of other circuits, correctly ruled that *Halper* applied to this case.

The recited history of the double jeopardy doctrine in America demonstrates its broad application from the earliest days to civil offenses as well as criminal, unlike in England where, as Blackstone tells us, double jeopardy was only available in a criminal proceeding following an acquittal or conviction. Because of this clearly broadened protection in America, we are firmly persuaded that the shield of double jeopardy remains in place regardless of the happenstance of whether the civil proceeding or

criminal prosecution arising from the same offense comes first. We now rule that such a fortuitous circumstance is of no moment in double jeopardy analysis. In short, double jeopardy protection may be claimed by a defendant whose indictment follows the imposition of a punitive civil sanction for the same offense.

Second, the government also urges that the $1.8 million financial obligation imposed on Morgan is not a civil penalty provided for by statute. Because the OTS had no statutory authority to impose a fine,[2] the payment imposed was, according to the government, not a fine by definition. In its brief, it declares the OTS *could not, and therefore did not* impose a statutory penalty upon Morgan. Therefore, the government concludes, Morgan's repayment obligation is to be construed simply as a personal debt—and a debt does not trigger double jeopardy protections.

We do not think the distinction between a personal obligation negotiated by settlement, and a fine fixed by statute, controls the double jeopardy analysis. As *Halper* noted, "This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual *by the machinery of the state*." 490 U.S. at 447 (emphasis added). In this case, the machinery of the state, as embodied by the OTS, compelled Morgan into undertaking this financial obligation. It is not controlling for analytical purposes whether that compulsion was or was not statutorily authorized.

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[2] The civil penalty provisions available to the OTS today under 12 U.S.C. § 1818(i) did not become effective until the passage on August 9, 1989 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, § 907(a), 103 Stat. 183, 462-63 (1991).

Even were the government to have acted beyond its authority in punishing an offender against its laws, the protections of the Double Jeopardy Clause are nonetheless triggered when the government acts to punish the same offender a second time. The government's argument boils down to this: if the OTS settlement with Morgan went beyond restitution, then the OTS exceeded its statutory authority in reaching it. We do not think governmental overreaching—if it occurred and if it amounted to punishment—will prevent Morgan from now asserting his constitutional right to be free from a second punishment for the same offense.

B. *Application of* Halper

Having concluded our examination of these threshold issues, analysis now turns to the rules laid down in *Halper*. The Supreme Court teaches that the purpose served by the civil sanction must be ascertained in order to determine whether it constitutes punishment. *See* 490 U.S. at 448-49. Labels such as "criminal" and "civil," "fine" and "repayment" are not controlling. They may not be used to defeat the safeguards guaranteed citizens under the Constitution. *See Kurth Ranch*, 114 S. Ct. at 1946 (label of tax does not end double jeopardy scrutiny because "at some point, an exaction labeled as a tax approaches punishment."); *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The question in each case is whether the sanction does more than merely compensate the government for its damages and costs. Normally the trial court must undertake a rough calculation to determine whether the size of the sanction can be fairly attributed solely to remedial purposes or whether it must be deemed—because of its disproportion in relation to mak-

ing the government whole—also to have been imposed for purposes of punishment. *See Halper*, 490 U.S. at 448-49.

Before undertaking this calculation we note Morgan's contention that it is Charter Federal, not the government, which sustained losses in excess of $2,275,000. The inference he would have us draw is that this figure may not be used in assessing the damage his conduct caused the government. His argument is not persuasive because Charter Federal's seizure by the Resolution Trust Corporation was attributable, at least in part, to Morgan's misconduct. Although the actual losses ultimately sustained by the government are not identical with the harm Morgan inflicted on the bank, the latter figure is a reasonable measure of the portion of the government's damages that have been occasioned by Morgan's actions.

In addition, Morgan claims that in his case no accounting of the government's damages and costs is necessary because the clear language of the consent order and judgment divided the remedial and retributive penalties into two separate categories: a $300,000 judgment "to correct the conditions alleged to have resulted" from his violations of law, and an additional fine of $1.5 million, labeled a "personal obligation." Since only the former is labeled remedial, Morgan insists that the latter larger fine is plainly punishment. Ironically, Morgan's argument depends on the importance of a label, even as he disavows reliance on such tags.

The district court concluded that the only goal of the OTS civil proceeding was to obtain restitution and Morgan's agreement not to further participate in the conduct of the affairs of a financial institution. The trial court based this conclusion on a careful reading of the OTS

documents themselves, which revealed that those documents consistently refer to both of the payments imposed as "restitution." The consent order includes the $1.5 million "personal obligation" as a subsection of Paragraph Three, entitled "Restitution." Elsewhere in the consent order, the payments ordered under that paragraph are referred to as Morgan's "obligation to reimburse against loss."

Moreover, the district court did not simply rely on its own competing assessment of the labels the OTS documents attached to the monetary payments. Judge Daly went on to consider the underlying purpose of the settlement. He found that although the Notice of Charges averred that the bank lost $2,275,000, the consent judgment of $1.8 million represented a compromise of the amount the bank lost that reasonably could be attributed to Morgan's conduct. No other basis for the compromise is set forth in the settlement documents.

A defendant must make a threshold showing of "punishment" before a court undertakes a double jeopardy analysis. *See United States v. Mongelli*, 2 F.3d at 30. In the context of a civil sanction, this threshold is met by showing the sanction to be overwhelmingly disproportionate to the government's damages and expenses. Leeway is given to achieve "rough justice" when computing the precise amount of damages and costs the government suffered. *See Halper*, 490 U.S. at 449; *38 Whalers Cove*, 954 F.2d at 34-35. Only in the rare case where such disproportion is shown does the burden of accounting for its damages and costs fall on the government. *Halper*, 490 U.S. at 449-50. This is not that case. We cannot say that this civil sanction is so divorced from the reality of what the government suffered in damages and expenses as to constitute punishment. *See Halper*, 490 U.S. at 442.

Rather, the dollar amount of the compromise we think falls within the bounds of doing rough justice.

In sum, appellant has failed to make a threshold showing that any of the terms of the civil settlement could be construed as punishment. Consequently, double jeopardy protection does not attach, and the government could lawfully file an indictment against Morgan after imposing a civil sanction against him for the same conduct.

CONCLUSION

The denial of the motion to dismiss the indictment against defendant Morgan is accordingly affirmed.

The Order of the United States Supreme Court denying Petition for Writ of Certiorari (Interlocutory Appeal) United States v. Morgan, 116 S. Ct. 171 (1995) (Mem)

116 S. Ct. 171 (Mem)

Michael G. MORGAN, petitioner,
v.
UNITED STATES.

No. 95-14.

Supreme Court of the United States
Oct. 2, 1995.

Case below, 845 F.Supp. 934; 51 F.3d 1105

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Order Of The Court of Appeals
For The Second Circuit
Denying Petition For Rehearing
And Suggestion For Reharing In Banc
Issued July 17, 1997

CTDC-NHCT
93-cr-212
DORSEY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of July, one thousand nine hundred and ninety-seven.

USA

v. Dkt. No: 96-1632

Morgan

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Michael G. Morgan.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By:

\s\
Arthur M. Heller
Administrative Attorney

p o ccc
inbancdn_frm

Title 12, United States Code, § 1818(e)

Title 12, United States Code, § 1818(e):

§ 1818. Termination of status as insured depository institution

(e) Removal and prohibition authority

(1) AUTHORITY TO ISSUE ORDER. - Whenever the appropriate Federal banking agency determines that -

(A) any institution-affiliated party has, directly or indirectly or -

(i) violated -

(I) any law or regulation;

(II) any cease-and-desist order which as become final;

(III) any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(IV) any written agreement between such depository institution and such agency;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)-

(i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach-

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,

the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

(2) SPECIFIC VIOLATIONS.-

(A) In General. - Whenever the appropriate Federal banking agency determines that-

(i) an institution-affiliated party has committed a violation of any provision of subchapter II of chapter 53 of title 31 and

such violation was not inadvertent or unintentional;

(ii) an officer or director of an insured depository institution has knowledge that an institution-affiliated party of the insured depository institution has violated any such provision or any provision of law referred to in subsection (g)(1)(A)(ii) of this section; or

(iii) an officer or director of an insured depository institution has committed any violation of the Depository Institution Management Interlocks Act [12 U.S.C. 3201 et seq.],

the agency may serve upon such party, officer, or director a written notice of the agency's intention to remove such party from office.

(B) Factors To Be Considered. - In determining whether an officer or director should be removed as a result of the application of subparagraph (A)(ii), the agency shall consider whether the officer or director took appropriate action to stop, or to prevent the recurrence of, a violation described in such subparagraph.

(3) SUSPENSION ORDER.-

(A) Suspension or Prohibition Authorized. - If the appropriate Federal banking agency serves written notice under paragraph (1) or (2) to any institution-affiliated party of such agency's intention to issue an order under

such paragraph, the appropriate Federal banking agency may suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution, if the agency-

(i) determines that such action is necessary for the protection of the depository institution or the interests of the depository institution's depositors; and

(ii) serves such party with written notice of the suspension order.

(B) Effective Period.- Any suspension order issued under subparagraph (A)-

(i) shall become effective upon service; and

(ii) unless a court issues a stay of such order under subsection (f) of this section, shall remain in effect and enforceable until-

(I) the date the appropriate Federal banking agency dismisses the charges contained in the notice served under paragraph (1) or (2) with respect to such party; or

(II) the effective date of an order issued by the agency to such party under paragraph (1) or (2).

(C) Copy of Order. - If an appropriate Federal banking agency issues a suspension order under subparagraph (A) to any

institution-affiliated party, the agency shall serve a copy of such order on any insured depository institution with which such party is associated at the time such order is issued.

(4) A notice of intention to remove an institution-affiliated party from office or to prohibit such party from participating in the conduct of the affairs of an insured depository institution, shall contain a statement of the facts constituting the grounds therefore, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or later date is set by the agency at the request of (A) such party, and for good cause shown, or (B) the Attorney General of the United States. Unless such party shall appear at the hearing in person or by a duly authorized representative, such party shall be deemed to have consented to the issuance of an order of such removal or prohibition. In the event of such consent, or if upon the record made at any such hearing the agency shall find that any of the grounds specified in such notice have been established, the agency may issue such orders of suspension or removal from office, or prohibition from participation in the conduct of the affairs of the depository institution, as it may deem appropriate. ...

(5) For the purpose of enforcing any law, rule, regulation, or cease-and-desist order in connection with an interlocking relationship, the term "officer" within the term "institution-affiliated party" as used in this subsection means an employee or officer with management functions,

and the term "director" within the term "institution-affiliated party" as used in this subsection includes an advisory or honorary director, a trustee of a depository institution under the control of trustees, or any person who has a representative or nominee serving in any such capacity.

(6) PROHIBITION OF CERTAIN SPECIFIC ACTIVITIES.- Any person subject to an order issued under this subsection shall not-

(A) participate in any manner in the conduct of the affairs of any institution or agency specified in paragraph (7)(A);

(B) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subparagraph (A);

(C) violate any voting agreement previously approved by the appropriate Federal banking agency; or

(D) vote for a director, or serve or act as an institution-affiliated party.

(7) INDUSTRYWIDE PROHIBITION.-

(A) In general.- Except as provided in subparagraph (B), any person who, pursuant to an order issued under this subsection or subsection (g) of this section, has been removed or suspended from office in an insured depository institution or prohibited from participating in the conduct of the affairs of an insured depository institution may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of -

(i) any insured depository institution;

(ii) any institution treated as an insured bank under subsection (b)(3) or (b)(4) of this section, or as a savings association under subsection (b)(8) of this section;

(iii) any insured credit union under the Federal Credit Union Act [12 U.S.C. 1751 et seq.];

(iv) any institution chartered under the Farm Credit Act of 1971 [12 U.S.C. 2001 et seq.];

(v) any appropriate Federal depository institution regulatory agency;

(vi) the Federal Housing Finance Board and any Federal home loan bank; and

(vii) the Resolution Trust Corporation.

(B) EXCEPTION IF AGENCY PROVIDES WRITTEN CONSENT.- If, on or after the date an order is issued under this subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of-

(i) the agency that issued such order; and

(ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party,

subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent. Any agency that grants

such a written consent shall report such action to the Corporation and publicly disclose such consent.

(C) VIOLATION OF PARAGRAPH TREATED AS VIOLATION OF ORDER.- Any violation of subparagraph (A) by any person who is subject to an order described in such subparagraph shall be treated as a violation of the order.

(D) "APPROPRIATE FEDERAL FINANCIAL INSTITUTIONS REGULATORY AGENCY" DEFINED.- For purposes of this paragraph and subsection (j) of this section, the term "appropriate Federal financial institutions regulatory agency" means-

(i) the appropriate Federal banking agency, in the case of the insured depository institution;

(ii) the Farm Credit Administration, in the case of an institution chartered under the Farm Credit Act of 1971 [12 U.S.C. 2001 et seq.];

(iii) the National Credit Union Administration Board, in the case of an insured credit union (as defined in section 101(7) of the Federal Credit Union Act [12 U.S.C. 1752(7)]);

(iv) the Secretary of the Treasury, in the case of the Federal Housing Finance Board and any Federal home loan bank; and

(v) the Thrift Depositor Protection Oversight Board, in the case of the Resolution Trust Corporation.

(E) CONSULTATION BETWEEN AGENCIES.- The agencies referred to in clauses (i) and (ii) of subparagraph (B) shall consult with each other before providing any written consent described in subparagraph (B).

(F) APPLICABILITY.- This paragraph shall only apply to a person who is an individual, unless the appropriate Federal banking agency specifically finds that is should apply to a corporation, firm, or other business enterprise.

Consent Order
Signed Between Office Of Thrift Supervision
And Michael G. Morgan
In The Matter of Michael G. Morgan
January 19, 1993

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
OF THE DEPARTMENT OF THE TREASURY

In the Matter of	
Michael G. Morgan	Re: OTS AP 93-7
A Former Officer and Director of Charter Federal Savings and Loan Association Stamford, Connecticut	Date: January 19, 1993

CONSENT ORDER

WHEREAS, Michael G. Morgan (**"RESPONDENT"**) has executed Stipulation and Consent to issuance of Consent Order (**"STIPULATION and CONSENT"**), which is accepted and approved by the Office of Thrift Supervision (**"OTS"**), acting by and through its Director, Timothy Ryan; and

WHEREAS, RESPONDENT, in the **STIPULATION and CONSENT,** has agreed and consented to the issuance of this Consent Order pursuant to Sections 8(b) and 8 (e) of the Federal Deposit Insurance Act ("FDIC"), 12 U.S.C.A. §§ 1818(b) and (e) (West 1989 and Supp. 1992);

WHEREAS, on _____, pursuant to OTS Order No. _____, the **OTS** approved and issued a Notice of Charges and Hearing to Direct

Restitution and other Appropriate Relief and Notice of Intention to Prohibit **RESPONDENT** from participating in the conduct of the affairs of federally insured depository institutions ("**NOTICE**");

WHEREAS, RESPONDENT neither admits nor denies the assertions of fact or allegations of unsafe and unsound practices and violations of law, rules and regulations set forth in the **STIPULATION and CONSENT** as such pertain and apply to **RESPONDENT**;

NOW, THEREFORE, IT IS ORDERED that:

1. The **STIPULATION and CONSENT,** attached hereto, is made a part hereof and is incorporated herein by reference.

2. **RESPONDENT** shall cease and desist from:

a. committing, or aiding and abetting the commitment of, unsafe and unsound practices and violations of laws, rules and regulations set forth in the NOTICE; and

b. committing, or aiding and abetting the commitment of, any unsafe and unsound practice or any violation of any law, regulation, rule or condition imposed in writing by a Federal regulatory banking agency in connection with the conduct of the business of any federally insured financial institution set forth in Section 8(e)(7)(A) of the FDIA, 12 U.S.C. § 1818(e)(7)(A) (Supp. II 1990) ("insured institution").

RESTITUTION

3. Based upon his sworn statement of financial condition and other relevant factors, including his desire and willingness to cooperate with the **OTS** and to reimburse Charter Federal Savings and Loan Association, Stamford, Connecticut against loss:

a. **RESPONDENT** shall execute the annexed consent judgment in the amount of $300,000 to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law, regulations and rules set forth against the **RESPONDENT** in the **NOTICE**. The **OTS** may record the judgment against **RESPONDENT**, but will not execute upon such judgment so long as **RESPONDENT** complies with the payment schedule set forth in Subparagraph 3.c. below.

b. In addition to the judgment, **RESPONDENT** also agrees to pay the further sum of $1,500,000 pursuant to the schedule set forth in Subparagraph 3.c. This payment obligation is a personal obligation of the RESPONDENT and upon his death will not be an obligation of his estate.

c. To discharge the judgment and payment obligation specified above, **RESPONDENT** shall make annual payments to the **OTS**, or its successor, or to any entity that they may designate, on each anniversary date of the issuance of the **ORDER** according to the following schedule, until the amounts of $300,000 and $1,500,000 are paid:

(1) five percent (5%) of **RESPONDENT'S** gross income (as defined in the Internal Revenue Code) for the most recent calendar year of $25,000 to $50,000;

(2) ten percent (10%) of **RESPONDENT'S** gross income of $50,001 to $100,000;

(3) twenty percent (20%) of **RESPONDENT'S** adjusted gross income of $100,001 to $200,000;

(4) thirty percent (30%) of the amount by which **RESPONDENT'S** adjusted gross income (as defined in the Internal Revenue Code) exceeds the sum of $200,000 plus the amount of Federal and state income taxes (including FICA) payable by **RESPONDENT** with respect to that adjusted gross income.

FINANCIAL DISCLOSURE

4. Prior to the issuance of this **ORDER, RESPONDENT** provided the **OTS** with the financial disclosure set forth in paragraph 5 below, which was accompanied by his sworn affidavit attesting to the accuracy of his financial disclosure. This disclosure and the accompanying affidavit was expressly relied upon by the **OTS** in agreeing to enter into the **STIPULATION and CONSENT** and the **ORDER.** The information contained in the disclosure demonstrated that the **RESPONDENT** presently has a negative or insubstantial net worth.

5. The financial disclosure of the **RESPONDENT** included (a) a current sworn statement of financial

condition as of _____, 19____, (b) copies of individual income tax returns for calendar years 1988, 1989, 1990 and 1991 and (c) statements detailing each transfer of assets during the period of August 1, 1989, through August 1, 1992, made between, to or from the **RESPONDENT**, his or her spouse, former spouse or any child, including emancipated children, with a total aggregate market value per transfer of $10,000 or more. The statements of financial condition were required to truthfully and accurately disclose all assets, liabilities, and net worth of the **RESPONDENT.** The assets and transfers disclosed included those to which the **RESPONDENT** or members of his immediate family held, conveyed or received legal, equatable, or beneficial title or interest, whether such title or interest is liquidated, inchoate or contingent.

6. The **RESPONDENT** shall, within 15 days of the entry of the **ORDER**, either (a) provide a sworn affidavit under penalty of perjury stating that the previously submitted financial disclosure described in paragraph 5 is still true and correct or, in the alternative, (b) submit financial disclosure, updated to the date of this **ORDER**, of the nature described in paragraph 5 above, accompanied by a sworn affidavit under penalty of perjury that the information contained in such updated financial disclosure is true and correct.

7. Until such time as the amounts set forth in paragraph 3 above are fully paid and satisfied, **RESPONDENT** shall submit, on the anniversary of the issuance of the **ORDER**, to the **OTS**, on such terms and conditions as the **OTS** or its successor may hereafter

require from **RESPONDENT**, the following additional financial disclosure accompanied by a sworn affidavit under penalty of perjury of the **RESPONDENT** stating that the accompanying financial disclosure is true and correct:

a. a current statement of the financial condition, as of the most recent calendar year-end, of the **RESPONDENT**, including consolidated statements of the financial condition of **RESPONDENT** and other parties and a statement of the financial condition of any entity in which **RESPONDENT** held legal, equitable or beneficial title or interest of a 25 percent or greater share;

b. copies of the most recently filed income tax returns of the **RESPONDENT** or any nominee of the **RESPONDENT**;

c. a statement setting forth all transfers since the date of the previous financial disclosure made to or from the **RESPONDENT** or his or her spouse or dependant children from any source that singularly, or when aggregated with other payments from the same source, exceed in market value $10,000 along with a statement setting forth the nature of each such transfer; and

d. a statement of all assets of any nature whatsoever, including gifts and bequests, received by the **RESPONDENT** since the date of the previous financial disclosure made by the **RESPONDENT**, the market value of which exceed by $10,000 or more the amount of any consideration paid by the **RESPONDENT** for the asset. The assets, liabilities and transfers that must be disclosed

pursuant to this paragraph shall include all assets, liabilities and transfers of the nature described in paragraph 5.

8. Solely for the purpose of assessing the accuracy of representations made by the **RESPONDENT** in the financial disclosure required under the **ORDER**, the **RESPONDENT** shall, upon reasonable notice and without service of a subpoena or other process, permit the **OTS** to inspect and copy all books, records, receipts and documentation of any nature whatsoever that he maintains or are under his control that support, document of in any way relate to such financial disclosure. The **OTS** may not request such inspection more than once a year.

PROHIBITION

9. **RESPONDENT** shall not hold any office in or participate in any manner in the conduct of the affairs of institution(s) or other entity(ies), as set forth in Section 8(e)(7)(A) of the FDIA, 12 U.S.C. § 1818 (e)(7)(A) without the prior written approval of the Director of OTS, or his designee, and, if appropriate, the approval of other Federal financial institutions regulatory agency(ies). Pursuant to Section 8(e)(6) of the FDIA, 12 U.S.C. § 1818 (e)(6) (Supp. II 1990), conduct prohibited by this **ORDER** includes, inter alia, the solicitation, transfer, or exercise of any voting rights with respect to any securities issued by any insured institution or voting for a director of an insured institution or acting as an institution-affiliated party.

MISCELLANEOUS

10. In any bankruptcy proceeding in which it is or may be contended that **RESPONDENT'S** obligation to make the payment of restitution pursuant to the **STIPULATION AND CONSENT** and the **ORDER** is subject to discharge, **RESPONDENT** will in no manner contest **OTS's** assertions, under 11 U.S.C. § 523(a)(11) (Supp. II 1990) or otherwise, that the obligation is for, and the **ORDER** arises out of, acts that result in claims not dischargeable in bankruptcy in any circumstances, pursuant to any of the provisions of the United States Bankruptcy Code.

11. All payments by **RESPONDENT** required by paragraph 3 of this **ORDER** shall be delivered to:

Comptroller
Office of Thrift Supervision
U.S. Treasury Department
1700 G Street, N.W.
Washington, DC 20552

or as otherwise directed by the **OTS** or its successor in interest.

12. Any financial disclosure by **RESPONDENT** required by this **ORDER** shall be delivered to:

Regional Director
Office of Thrift Supervision
10 Exchange Place, 18th Floor
Jersey City, New Jersey 07302

or as otherwise directed by the **OTS** or its successor in interest.

13. In consideration of **RESPONDENT'S** agreement to comply with this **ORDER**, and inter alia, the recitals set forth in the **STIPULATION and CONSENT**, the **OTS** agrees to (i) dismiss the above-captioned enforcement proceeding against **RESPONDENT** and (ii) forebear from bringing any further enforcement proceedings against the **RESPONDENT** based upon, or arising from **RESPONDENT'S** conduct as an institution-affiliated party of Charter Federal, as that term is defined in Section 3(a) of the FDIA, 12 U.S.C. § 1813(a) (Supp. II 1990).

14. **RESPONDENT'S** obligation to reimburse against loss under paragraph 3 of this **ORDER** is his sole and separate obligation and will not be reduced by payments made to any entity other than the **OTS** or its successor by or on behalf of the **RESPONDENT**, and will not be reduced or subject to an off-set as a result of any payment made by or on behalf of any other person or entity.

15. This **ORDER** is subject to the provisions of Section 8(j) of the FDIA, 12 U.S.C. § 1818 (j) (Supp. II 1990).

16. This **ORDER** shall become effective on the date it is issued.

Approved as to form and content:

_____
John L. Altieri, Jr., Esq.
Attorney for **RESPONDENT**

The Office Of Thrift Supervision

BY: \s\
Timothy Ryan, Director
Office Of Thrift Supervision

BY: Jonathan Fiechter
Acting Director

Consent Judgment
Signed Between Office Of Thrift Supervision
And Michael G. Morgan
In The Matter of Michael G. Morgan
January 19, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION, Plaintiff	:
v.	:
MICHAEL G. MORGAN, Defendant	:

CONSENT JUDGMENT

WHEREAS Plaintiff, the Director of the Office of Thrift Supervision of the United States Department of the Treasury, issued to Defendant Michael G. Morgan a notice of charges and hearing;

WHEREAS Defendant, Michael G. Morgan, has executed a Stipulation and Consent to Issuance of Consent Order (the "Stipulation") (Exhibit 1 hereto and incorporated herein by reference) to settle, without admitting or denying said charges;

WHEREAS Plaintiff, the Director of the Office of Thrift Supervision, pursuant to the Stipulation, has issued a Consent Order (Exhibit 2 hereto and incorporated herein by reference) to Defendant that calls for entry of judgment against Defendant in the manner provided for herein;

WHEREAS this Court has jurisdiction over the subject matter of this action pursuant to 12 U.S.C. §

1818(i)(1) and personal jurisdiction over Defendant pursuant to his consent;

WHEREAS the Court, having reviewed the Stipulation and Consent Order, finds that judgment should be entered in accordance with the terms of the Consent Order;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that Plaintiff shall recover of the Defendant $300,000 without costs, payable according to the schedule provided in the Consent Order.

Consented To:

OFFICE OF THRIFT SUPERVISION
UNITED STATES DEPARTMENT OF
THE TREASURY

By: _____
Jonathan L. Feichter
Acting Director

\s_____
Michael G. Morgan

SO ORDERED:

_____
United States District Judge

Dated: January 19, 1993

Indictment
United States v. Morgan

UNTIED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

B-93-1

UNITED STATES OF AMERICA		
	:	**CRIMINAL NO.**
	:	**3:93CR212TGFD**
	:	
V.	:	**VIOLATIONS:**
	:	**18 U.S.C. §1344**
	:	**[Bank Fraud,**
	:	**(2 Counts)],**
MICHAEL G. MORGAN	:	**18 U.S.C. §657**
	:	**[Misapplication of**
	:	**Bank Funds**
	:	**(4 Counts)]**
	:	**18 U.S.C. §2**
	:	**[Aiding and Abetting]**

INDICTMENT

The Grand Jury charges that:

COUNT ONE

Background

1. At all times material hereto, Charter Federal Savings and Loan Association, ("Charter Federal") located

in Stamford, Connecticut, was a federally chartered financial institution the accounts of which were insured by the Federal Savings and Loan Insurance Corporation.

2. At all times material hereto, Bedford Equities Corporation ("BEC"), a Connecticut corporation, was a service corporation and a wholly-owned subsidiary operated by Charter Federal.

3. At all times material hereto, MICHAEL G. MORGAN, a defendant herein, was the President and Chief Executive Officer of Charter Federal and President of BEC.

4. At all times material hereto, Samuel G. Boyarsky ("Boyarsky") was a real estate broker and business acquaintance of the defendant MICHAEL G. MORGAN.

The Summer Street Transaction

5. 1200 Summer Street, Stamford, Connecticut (the "Summer Street property") was a commercial property acquired by BEC in 1984.

6. BEC and Michael Morgan, Trustee, acquired the Summer Street property by purchasing the general and limited partnership interests in a Connecticut limited partnership known as BVD Associates. BEC was also the general partner of Bedford Equities 1984 Limited Partnership ("BELP 1984") which was formed at or about the time of the acquisition of the Summer Street property

and was the entity to which Michael Morgan, Trustee and BEC thereafter assigned the Summer Street property.

7. BEC and BELP 84 acquired the Summer Street property on or about October 25, 1984.

8. The acquisition by BEC and BELP 1984 of the Summer Street property was financed in its entirety through funds advanced by Charter Federal.

9. Boyarsky was named in the closing documents of the Summer Street property transaction as the purchaser's real estate broker.

10. Boyarsky performed no real estate brokerage services in connection with the purchase of the Summer Street property.

11. At all times material hereto, Rockbridge Properties was a real estate brokerage firm, owned and operated solely by the defendant MICHAEL G. MORGAN.

12. On or about October 25, 1984, in the District of Connecticut and elsewhere, the defendant, MICHAEL G. MORGAN, with the intent to deceive, defraud and injure Charter Federal, did knowingly and willfully misapply and cause to be misapplied the sum of approximately $75,000 of the monies and funds belonging to Charter Federal, or otherwise entrusted to its care, in that the defendant, MICHAEL G. MORGAN would and did:

a. agree with Boyarsky that Boyarsky would appear to be the purchaser's real estate broker in the

purchase and sale agreement of the Summer Street property knowing full well that Boyarsky would provide no real estate brokerage services in connection with the transaction;

b. agree with Boyarsky that as the purchaser's purported broker, Boyarsky would receive a commission of $75,000, of which he would retain only $7,500, and the remainder of which Boyarsky would give to MICHAEL G. MORGAN, through MORGAN's real estate firm Rockbridge Properties;

c. Cause the closing documents on the Summer Street property transaction to falsely reflect that Boyarsky was the purchaser's real estate broker and therefore entitled to a commission in the amount of $75,000;

d. cause a check in the amount of $75,000 to be issued by BELP 1984 to Boyarsky as commission on the purchase of the Summer Street property;

e. instruct Boyarsky to obtain and give to MICHAEL G. MORGAN a check payable to Rockbridge Properties in the amount of $67,500; and

f. receive from Boyarsky $67,500 of the $75,000 paid as commission on the purchase of the Summer Street property knowing that he, MICHAEL G. MORGAN, was not entitled to receive a commission on the Summer Street transaction.

All in violation of Title 18, United States Code, § 657.

COUNT TWO

1-3. The Grand Jury realleges and incorporates by reference paragraphs 1 through 3 of Count One of this Indictment as though fully set forth herein.

4. At all times relevant hereto, William F. Malloy ("Malloy") was a member of the Board of Directors of Charter Federal.

5. 30 Buxton Farms Road, Stamford, Connecticut ("Buxton Farms") was a commercial property purchased by BEC in November, 1985.

6. In 1986, Buxton Farms was sold by BEC to third party purchasers ("the buyers") for $11,500,000.

The Scheme and Artifice to Defraud

7. From in or about mid-1986 through in or about June 1988, in the District of Connecticut and elsewhere, MICHAEL G. MORGAN, the defendant herein, with the aid of others known and unknown to the grand jury, did knowingly devise and intend to devise a scheme and artifice to defraud Charter Federal, a federally chartered and insured financial institution, and did knowingly devise a scheme or artifice to obtain monies, funds and other property owned by and under the custody and control of Charter Federal by means of false and fraudulent pretenses and representations.

8. It was a part of the scheme and artifice to defraud that the defendant MICHAEL G. MORGAN would and did:

a. agree with Malloy that upon the sale of Buxton Farms, Malloy would receive a $200,000 commission;

b. cause the sales contract on Buxton Farms to represent falsely that a commission was to be paid to another individual who was identified therein as the seller's broker (the "false broker");

c. use the false broker's name on the sales contract when the defendant well knew that the false broker had no knowledge of and played no part in the Buxton Farms transaction;

d. agree with Malloy that Malloy would forge the signature of the false broker on a document purporting to waive the commission due on the sale of Buxton Farms so that Charter Federal could record a falsely inflated profit on the Buxton Farms sale and thereby show a falsely inflated year-end profit for Charter Federal, knowing and intending however that the commission would be paid at a later date;

e. agree with Malloy that Malloy would forge the signature of the false broker on a document purporting to waive the commission due on the sale of the Buxton Farms property, so that Charter Federal would appear to meet federally imposed capital requirements, knowing that if the commission was shown as due and owing on Charter Federal's books and records, Charter

Federal would not be able to meet those capital requirements;

f. request that Malloy prepare false and fraudulent invoices to BEC totaling $200,000 which invoices represented that the false broker was due payment for purported consulting services, when in truth and in fact, the defendant knew this money was to be paid to Malloy as the commission on the sale of Buxton Farms and the false broker had no knowledge of the invoices, and the false broker had no knowledge of the invoices, and the false broker had not rendered consulting services for which any payment was due; and

g. cause the fraudulently prepared invoices to be paid by BEC to Malloy.

Execution of the Scheme and Artifice

9. In or about mid-1986 through in or about June, 1988, in the District of Connecticut, the defendant, MICHAEL G. MORGAN, did knowingly execute and attempt to execute the aforementioned scheme and artifice to defraud Charter Federal and to obtain monies, funds and other property owned by and under the custody and control of Charter Federal by means of false and fraudulent pretenses and representations, by misrepresenting the terms of the sale of Buxton Farms in that he prepared and caused to be executed the waiver of commission, thereby falsely inflating the profit shown on the books and records of Charter Federal for the sale of Buxton Farms and by causing the preparation of false and fraudulent invoices in the amount of $200,000 for fictitious consulting services

and causing Charter Federal through BEC to pay these false and fraudulent invoices.

All in violation of Title 18, United States Code, §§ 1344 and 2.

COUNT THREE

1-8. The Grand Jury realleges and incorporates by reference paragraphs 1 through 8 of Count Two of this Indictment as though fully set forth herein.

9. On or about December 15, 1987, in the District of Connecticut, MICHAEL G. MORGAN, the defendant herein, with the intent to deceive, defraud and injure Charter Federal, did knowingly and willfully misapply and cause to be misapplied the sum of approximately $115,000 of the monies and funds belonging to Charter Federal, or otherwise entrusted to its care, in that the defendant MICHAEL G. MORGAN did cause to be disbursed $115,000 to the false broker as payment of a fictitious invoice for consulting services which had not been performed by the false broker.

All in violation of Title 18, United States Code §§ 657 and 2.

COUNT FOUR

1-8. The Grand Jury realleges and incorporates by reference paragraphs 1 through 8 of Count Two of this Indictment as if fully set forth herein.

9. On or about June 10, 1988, in the District of Connecticut, MICHAEL G. MORGAN, the defendant herein, with the intent to deceive, defraud and injure Charter Federal, did knowingly and willfully misapply and cause to be misapplied the sum of approximately $85,000 of the monies and funds belonging to Charter Federal, or otherwise entrusted to its care, in that the defendant MICHAEL G. MORGAN did cause BEC to issue a check in the amount of $85,000 payable to the false broker as payment of a fictitious invoice for consulting services which had not been performed by the false broker.

All in violation of Title 18, United States Code §§ 657 and 2.

COUNT FIVE

1-3. The Grand Jury realleges and incorporates by reference paragraphs 1 through 3 of Count One of this Indictment as though fully set forth herein.

The Franklin Street Transaction

4. 159 Franklin Street, Stamford, Connecticut (the "Franklin Street property") was a commercial property acquired and owned by BEC.

5. On or about September 29, 1987, Burt M. Hoffman purchased the Franklin Street property from BEC for $2,000,000.

6. Prior to his purchase of the Franklin Street property, Hoffman applied for and obtained approval for the following two loans from Charter Federal:

a. a loan of $1,600,000 for the acquisition of the Franklin Street property (the "acquisition loan"); and

b. a loan of $1,875,000 for the costs associated with the development of the Franklin Street property (the "development loan").

The Scheme and Artifice to Defraud

7. From in or about June, 1987 through in or about June 30, 1988, in the District of Connecticut and elsewhere, the defendant, MICHAEL G. MORGAN, and others known and unknown to the Grand Jury, did knowingly devise and intend to devise a scheme and artifice to defraud Charter Federal, and to obtain monies, funds and other property owned by and under the custody and control of Charter Federal by means of false and fraudulent pretenses and representations.

8. It was a part of the scheme and artifice that the defendant MICHAEL G. MORGAN would and did:

a. structure the financing of Hoffman's purchase of the Franklin Street property so that it would falsely appear in the books and records of Charter Federal that a $400,000 down payment was made by Hoffman when in fact no down payment was made and the purchase was 100% financed by Charter Federal;

b. on or about September 29, 1987, cause two checks to be issued by Charter Federal to Hoffman in the amounts of $450,000 and $1,600,000 to satisfy the purchase price of the Franklin Street property;

c. misrepresent the nature and purpose of the $450,000 check by representing it to be a drawdown on the development loan for costs associated with the development of the Franklin Street property when MORGAN knew that $400,000 of the funds was to be applied to the purchase price of the Franklin Street property; and

d. misrepresent to Charter Federal and its auditors the terms of the acquisition loan and development loan thereby causing the entry of a false and fictitious profit in the books and records of Charter Federal.

Execution of the Scheme

9. On or about September 29, 1987 and continuing through on or about June 30, 1988 in the District of Connecticut, the defendant, MICHAEL G. MORGAN, did knowingly execute and attempt to execute the aforementioned scheme and artifice to defraud Charter Federal and to obtain money and funds by means of false pretenses and representations in that MICHAEL G. MORGAN did cause to be disbursed to Hoffman the purported development loan drawdown of $450,000, knowing that $400,000 of the funds were to be used to satisfy the purchase price of the Franklin Street property, knowing the books and records of Charter Federal would reflect receipt of $400,000 of these funds as a down

payment from Hoffman, and knowing that the books and records would therefore show a false and fictitious profit on the sale of the Franklin Street property.

All in violation of Title 18, United States Code, §§ 1344 and 2.

COUNT SIX

1-8. The Grand Jury realleges and incorporates by reference paragraphs 1 through 8 of Count Five of this Indictment as if fully set forth herein.

9. On or about September 29, 1987, in the District of Connecticut, MICHAEL G. MORGAN, the defendant herein, with the intent to deceive, defraud and injure Charter Federal, did knowingly and willfully misapply and cause to be misapplied the sum of approximately $400,000 of the monies and funds belonging to Charter Federal, or otherwise entrusted to its care, in that the defendant MICHAEL G. MORGAN did cause Charter Federal to disburse $450,000 to Hoffman knowing that $400,000 of said funds was not to be used to develop the Franklin Street property as represented, but rather was to be applied to the purchase price of the Franklin Street property.

All in violation of Title 18, United States Code §§ 657 and 2.

A True Bill

\s\
Foreperson

\s\
ALBERT S. DABROWSKI
UNITED STATES ATTORNEY

\s\
BARBARA BAILEY JONGBLOED
Supervisory Assistant United States Attorney

\s\
KARI A. PEDERSEN
Assistant United States Attorney

Excerpt Of Trial Transcript
United States v. Morgan
Volume IV, March 25, 1996
Argument By Defendant Re:
Motion For Acquittal On Count One

Page 132, line 10 through page 135, line 11
(By Mr. Santos)

Page 143, line 4 through line 15
(By Mr. Santos)

Page 145, line 1 through line 9
(By Mr. Santos)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Plaintiff,	:	CRIMINAL NUMBER 3:93CR212
-vs-	:	March 25, 1996
MICHAEL G. MORGAN Defendant.	:	VOLUME IV

TRIAL BY JURY
14 COTTAGE PLACE
WATERBURY, CONNECTICUT

B E F O R E:
THE HONORABLE T. F. GILROY DALY, U.S.D.J.

A P P E A R A N C E S:

For the Plaintiff:
KARI A. PEDERSEN, AUSA
BARBARA BAILEY-JONGBLOED, AUSA
UNITED STATES ATTORNEY'S OFFICE
915 Lafayette Boulevard
Bridgeport, CT 06604

For the Defendant:
HUBERT J. SANTOS, ESQUIRE
HOPE C. SEELEY, ESQUIRE
Santos, Peck & Seeley
51 Russ Street
Hartford, Connecticut 06106

Court Reporter Martha Marshall, RPR-CM
14 Cottage Place
Waterbury, Connecticut

Proceedings recorded by mechanical stenography, transcript produced by computer.

Page 132, line 10 through page 135, line 11

MR. SANTOS: On Count One dealing with Mr. Boyarsky, the issue is whether of not the Defendant misapplied bank funds. And the elements of that offense require the Government to prove beyond a reasonable doubt that Morgan was an officer, Charter Federal was insured by the FDIC and Morgan did not willfully misapply funds belonging to Charter Federal or entrusted to its care, and that Morgan acted with the intent to injure or defraud the bank. Now, obviously some of these matters are not in dispute. But what is in dispute is misapplication.

The evidence is not in dispute that there was a $150,000 commission due and owing on that transaction. That was the testimony of Mr. -- Attorney Senie. And what's in evidence offered by the Government is the contract for the sale of 1200 Summer Street which unequivocally states that the commission was $150,000. The Government doesn't, as far as I know, dispute that. That being the case, whether the money went to Boyarsky as a straw man for Morgan or whether it all went to Susan Senie in her business Commercial Properties, would have been the end result in any event. In other words, there was no misapplication of bank funds that the bank expended, assuming that money came from the bank, that in any way would not have occurred. Because if there were no straw man, namely Boyarsky, $150,000 of bank money, it that's the case, would have gone to Susan Senie.

To constitute misapplication within the meaning of the statute, the bank officer's conduct must involve some risk of pecuniary loss to the bank. And that case is United

States v. Clark, 765 F.2d 297 at 303, which is the Second Circuit 1985. And I asked Mr. Senie, look, if they're only one -- if Mr. Boyarsky were not involved in this transaction, what would have been the commission that would have been paid. And his answer was $150,000. Either all to my wife's company or to some other broker who was involved in the transaction.

Second of all, we have in this count the other issue of whether or not the $150,000 was, in fact, bank funds. Because the escrow account that was the result of contributions from the 22 limited partners had sufficient funds -- that was the money that was supposed to be used for this transaction. This transaction was basically financed from four different sources, and Mr. Senie testified about this. One was a loan from Charter Federal in the amount of $1,950,000. The other was the assumption of a first mortgage. The other was a purchase money mortgage taken back by the seller in the amount of $350,000. And the other was a substantial contribution made by the limited partners of the 1984 Bedford Equities Limited Partnership. That was the funds that were available to do this transaction.

I submit to Your Honor the Government has not established beyond a reasonable doubt that bank funds were involved to fund this transaction. If the $150,000 had to be paid, which is conceded, as I understand it, there was no risk of pecuniary loss to the bank. And second of all, Morgan -- the fact that the Board of Directors voiced a position that Morgan should not receive real estate commissions does not make this a crime. Because if the Board of Directors said that Morgan could receive real

estate commissions, it would not make what is a crime not a crime. Whatever the board did as to whether or not this was criminal or not criminal, cannot be controlled by a resolution from the Board of Directors. It's either a violation of the misapplication statute or it's not. And consequently, the board's voicing concern, although they never passed a formal resolution, they have in the minutes of the Board of Directors they said, Mr. Morgan, you want real estate commissions, you can't have them. What would be the situation, Your Honor, if the board had passed a resolution saying Mr. Morgan could have real estate commissions? Would we be here with an accusation in this application? I submit we would not. And this case really -- this count really is a false statement count or a false document count. If you accept the proposition that Boyarsky's a straw man. But the Government elected not to charge false statement or false entry.

Page 143, line 4 through line 15

MR. SANTOS: Very briefly, Your Honor. To the extent that the Government says the United States versus Clark stands for just the issue of intent, the Court says it is evident that to constitute misapplication within the meaning of the statute, the bank officer's conduct must involve some risk of pecuniary loss to the bank, not simply the violation of a rule or policy not designed to protect the bank's assets against loss. And I submit that under that test there was no risk of pecuniary loss on this transaction because Malloy was entitled -- the 150 was due and owing to somebody, and Malloy was due the 200 and Hoffman was entitled to a hundred percent financing.

Page 145, line 1 through line 9

THE COURT: All right. Applying the standard which is applicable at this stage of these proceedings which is giving the Government the benefit of the available inferences, and without addressing credibility in any way at all, I find there is sufficient evidence from which a reasonable juror could conclude beyond a reasonable doubt that Mr. Morgan is guilty of each of the counts set forth in the indictment. And that is the standard I think I have to apply and I, therefore, deny the motions.

Excerpt Of Sentencing Transcript
United States v. Morgan
September 23, 1996
Discussion Re: Loss Relating
To Count One

Page 30, line 16 through page 31, line 1

Page 92, line 21 through line 23

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

U.S.A. Plaintiff	:	3:93 cr 212
v.	:	
MICHAEL G. MORGAN Defendant	:	New Haven, Connecticut September 23, 1996

SENTENCING
BEFORE THE HONORABLE PETER C. DORSEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

KARI A. PEDERSEN, ATTORNEY
U.S. Attorney's Office
915 Lafayette Boulevard
Bridgeport, Connecticut 06604

BARBARA B. JONGBLOED, ATTORNEY
U.S. Attorney's Office
157 Church Street
New Haven, CT 06508

For the Defendant:

Santos & Seeley
BY: HUBERT J. SANTOS, ATTORNEY
HOPE C. SEELEY, ATTORNEY
51 Russ Street
Hartford, Connecticut 06106

Probation Officer: Michael Guglielmo

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

Sentencing Transcript
Page 30, line 16 through page 31, line 1

MR. SANTOS [defense counsel]: What the government doesn't tell you is that the first count resulted in a huge profit ....

THE COURT: ..... The fact is that what's involved there is a theft for which he stands convicted of $75,000.00. The claim is that a commission was taken from the bank in the amount of $75,000.00 under somewhat less than totally disclosed premises.

Sentencing Transcript
Page 92, line 21 through line 23

MS. PEDERSEN [Assistant U.S. Atty.]: If Summer Street is considered to be relevant conduct [Count One], I believe the PSR includes the $75,000.00 loss from that transaction.

Supreme Court, U.S.
FILED
OCT 22 1997
CLERK

(2)

No. 97-348

In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHAEL G. MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13PP

QUESTION PRESENTED

Whether the Double Jeopardy Clause barred petitioner's criminal prosecution and punishment on charges of bank fraud and misapplication of bank funds because he had previously agreed to make $1.8 million in restitution to the Office of Thrift Supervision based on the same conduct.

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Constitution and Statutes:

U.S. Const.:	
Amend V (Double Jeopardy Clause)	4, 5, 6, 7, 8
18 U.S.C. 657	2
18 U.S.C. 1344	2

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-348

MICHAEL G. MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-21A) is unpublished, but the decision is noted at 113 F.3d 1230 (Table). A prior opinion of the court of appeals (Pet. App. 47A-69A) is reported at 51 F.3d 1105. The opinion of the district court denying petitioner's pretrial motion to dismiss on double jeopardy grounds (Pet. App. 27A-46A) is reported at 845 F. Supp. 934.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1997. A petition for rehearing was denied on July 17, 1997. The petition for a writ of certiorari was

filed on August 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on two counts of bank fraud, in violation of 18 U.S.C. 1344, and four counts of misapplication of bank funds, in violation of 18 U.S.C. 657. He was sentenced to 33 months' imprisonment, to be followed by three years' supervised release, and ordered to pay a fine of $6,000. The court of appeals affirmed. Pet. App. 2A-21A.

1. In 1984, petitioner founded Charter Federal Savings and Loan Association in Stamford, Connecticut, and became its president and chief executive officer. A short time later, he set up Bedford Equities Corporation, a wholly owned subsidiary of Charter Federal, to engage in real estate transactions on behalf of the savings and loan. When Charter Federal began operations, petitioner asked its board of directors for permission to receive commissions for locating real estate for Charter Federal to purchase. The board denied petitioner that authority because it believed that allowing petitioner to receive commissions would create a conflict of interest. Pet. App. 4A, 50A-51A; Gov't C.A. Br. 7.

Later the same year, petitioner urged Charter Federal's board of directors to approve Bedford's purchase of property at 1200 Summer Street in Stamford for $3.65 million. Petitioner told the board that the real estate commission on the sale would be split between the listing agent and Samual Boyarsky, a real estate broker. In fact, Boyarsky agreed to act as a straw man for petitioner and secretly returned

$67,500 of his $75,000 commission to petitioner. Pet. App. 7A.

In 1986, Bedford sought to sell commercial property at 30 Buxton Farms Road. William Malloy, a member of Charter Federal's board, suggested two potential purchasers for the property, and petitioner and Malloy agreed that Malloy would receive a $200,000 commission from the sale when one of these individuals purchased the property. Because Malloy was a member of the board, however, petitioner and Malloy listed Brian Egan as the broker for the deal. Because of a shortfall of capital, Charter Federal was not able to pay the commission immediately, and so petitioner arranged for Egan to obtain a $100,000 loan from Charter Federal, the proceeds of which Egan gave to Malloy. A year later, to obtain the remainder of the commission, Malloy submitted two false invoices in Egan's name, which petitioner then approved for payment. Pet. App. 8A-9A.

In mid-1987, petitioner sought to sell another Bedford property at 159 Franklin Street to Burt Hoffman, a developer. Although interested in the purchase, Hoffman lacked the capital to buy the property. Petitioner therefore arranged for Hoffman to obtain a "development loan" so that Hoffman could use the proceeds of that loan to make the down payment on the Franklin Street property. That arrangement was used to allow Charter Federal to report a profit on the sale. Pet. App. 10A-11A.

2. In 1990, Charter Federal became insolvent and was seized by the Resolution Trust Corporation. A short time later, the Office of Thrift Supervision (OTS) began an investigation of the savings and loan. In 1993, OTS filed a formal notice of charges against petitioner. Petitioner entered into a consent order

with OTS settling the formal charges. Pet. App. 85A-95A. In the consent order, under the heading "Restitution," petitioner agreed to pay OTS $300,000 "to correct the conditions alleged to have resulted from the unsafe and unsound practices and violations of law" alleged in the notice. In the same portion of the consent order, petitioner also agreed "to pay the further sum of $1,500,000" as a "personal obligation." *Id.* at 88A. Both of these payments were intended "to reimburse Charter Federal Savings and Loan Association, Stamford, Connecticut against loss." *Ibid.*

3. On September 22, 1993, the government obtained an indictment charging petitioner with bank fraud and misapplication of bank funds based on the same conduct that formed the basis for the OTS charges. Pet. App. 33A. Relying on *United States* v. *Halper*, 490 U.S. 435 (1989), petitioner moved to dismiss the indictment, alleging that the $1.8 million settlement with OTS constituted punishment for the offenses charged in the indictment, and therefore that the multiple punishments prong of the Double Jeopardy Clause barred his prosecution on the indictment. The district court denied the motion to dismiss. Pet. App. 27A-46A. The court found that "restitution and an agreement not to participate in the affairs of any financial institutions were the only goals of the OTS proceeding," *id.* at 37A, and that "the Consent Judgment of $1,800,000 constituted a compromise concerning the amount of the Charter loss attributed to [petitioner's] actions," *id.* at 38A. Accordingly, the court concluded, "the OTS settlement was for remedial, not punitive purposes," because it sought to recompense the government for the $2.2 million in losses to Charter Federal. *Ibid.*

4. Petitioner took an interlocutory appeal, and the court of appeals affirmed. Pet. App. 47A-69A. The court of appeals agreed with the district court that petitioner's agreement to pay $1.8 million to OTS served the remedial purpose of recompensing OTS for the losses petitioner caused to Charter Federal. *Id.* at 68A. The court thus found that petitioner had "failed to make a threshold showing that any of the terms of the civil settlement could be construed as punishment. Consequently, double jeopardy protection does not attach." *Id.* at 69A. This Court denied review. *Morgan* v. *United States*, 116 S. Ct. 171 (1995).

5. On remand, a jury found petitioner guilty on all six counts charged in the indictment. At sentencing, the district court found that, for purposes of setting petitioner's offense level under the Sentencing Guidelines, the loss caused by petitioner's offenses amounted to $400,000. On appeal from that conviction, petitioner again asserted that the Double Jeopardy Clause barred his prosecution on the indictment because of his prior civil settlement with OTS. He argued that the court of appeals should reconsider its prior ruling in light of the district court's finding of loss under the Sentencing Guidelines. In petitioner's view, the district court's loss finding showed that the $1.8 million civil settlement was disproportionate to the loss caused by his conduct and thus constituted punishment under the Double Jeopardy Clause as interpreted in *Halper*.

The court of appeals rejected that contention, finding that "[t]he OTS settlement requiring [petitioner] to pay $1.8 million was based on OTS figures estimating a total loss of $2.275 million." Pet. App. 13A. It held that the district court's sentencing findings

did not require a different result, because the district court's "finding of loss attributable under the sentencing guidelines does not purport to calculate the total amount of loss to the government caused by the defendant's conduct. It is limited to calculation of defined categories of loss caused by charged and 'relevant' conduct." *Ibid.* Here, the court of appeals concluded, the district court's loss calculation "did not include several elements that were considered by OTS in its determination of loss," including losses that occurred before the effective date of the Guidelines and "loss attributable to cost of investigation and enforcement." *Id.* at 13A-14A. The court accordingly held that petitioner had "failed to demonstrate that the OTS settlement was disproportionate and therefore punitive, rather than remedial." *Id.* at 14A.

ARGUMENT

Petitioner renews his contention (Pet. 19-30) that his criminal prosecution and punishment violated the Double Jeopardy Clause. He bases that claim on the theory that he suffered punishment within the meaning of the Clause's protection against multiple punishments when he earlier agreed to pay $1.5 million to the OTS as "a personal obligation." The court of appeals correctly rejected that argument.

1. This Court has construed the Double Jeopardy Clause to protect against both "successive punishments and * * * successive prosecutions." *United States* v. *Dixon*, 509 U.S. 688, 696 (1993). Although Congress ordinarily "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Clause, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938), this Court in *United States* v. *Halper*, 490 U.S. 435 (1989), "an-

nounce[d] * * * a rule for the rare case * * * where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449. In such a case, *Halper* held that, "[w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." *Id.* at 449-450. If the civil penalty "does not remotely approximate the Government's damages and actual costs," then, according to *Halper*, it constitutes punishment for double jeopardy purposes and must be reduced to a remedial level. *Id.* at 446, 452.

In *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), the Court made clear that *Halper* does not prevent the government from both prosecuting someone for an offense and requiring him, pursuant to civil proceedings, to give up the proceeds of his offense. The Court specifically noted in *Ursery* that a civil provision requiring forfeiture of proceeds of illegal drug activity "serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts," *id.* at 2148-2149, and therefore does not constitute punishment under the Double Jeopardy Clause. Likewise, the courts of appeals that have addressed the issue have unanimously concluded that civil remedies such as restitution and disgorgement are not punishment within the meaning of the Clause because they serve the nonpunitive purpose of preventing offenders from profiting by their illegal acts. See

United States v. *Gartner*, 93 F.3d 633, 635 (9th Cir.), cert. denied, 117 S. Ct. 624 (1996); *Smith* v. *United States*, 76 F.3d 879, 882 (7th Cir. 1996); *United States* v. *Fields*, 72 F.3d 1200, 1209 (5th Cir.), cert. denied, 117 S. Ct. 48 (1996); *United States* v. *Carson*, 52 F.3d 1173, 1182-1183 (2d Cir. 1995), cert. denied, 116 S. Ct. 934 (1996); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994). At a minimum, therefore, when the government imposes a civil restitution or disgorgement remedy that is not grossly disproportionate to the amount by which the defendant has profited or the damage that he has caused, it does not punish that defendant within the meaning of the Double Jeopardy Clause.

A straightforward application of these principles demonstrates that the court of appeals correctly concluded that petitioner was not punished when he agreed to pay restitution to OTS. In response to petitioner's pretrial motion to dismiss on double jeopardy grounds, the district court found that petitioner's conduct had caused Charter Federal to suffer losses of more than $2 million, for which the government became responsible when it seized the thrift. Pet. App. 38A. The consent judgment to which petitioner agreed required petitioner to pay, under the rubric of "Restitution," $1.8 million, which is considerably less than the damage that petitioner caused. See *Halper*, 490 U.S. at 449-450. The assessment imposed on petitioner was not "overwhelmingly disproportionate to the damages he has caused" (*ibid.*) and therefore did not constitute punishment within the meaning of *Halper*.

It is irrelevant that the settlement documents referred to $1.5 million of that amount separately from the $300,000 specifically dedicated "to correct the

conditions alleged to have resulted" from petitioner's offense because, as the court of appeals observed, the documents "consistently refer to both of the payments imposed as 'restitution.'" Pet. App. 67A-68A. Moreover, the total settlement was plainly reached "as a compromise of the amount the bank lost," and "[n]o other basis for the compromise is set forth in the settlement documents." *Id.* at 68A. The entire $1.8 million was properly treated, therefore, as restitution and nonpunitive.

Petitioner contends (Pet. 23-30), however, that the $1.8 million in restitution that he agreed to pay constituted punishment because the district court found at sentencing that the quantity of loss that should be used to set petitioner's offense level under the Sentencing Guidelines was $400,000. That fact-bound contention provides no basis for this Court's review. As the court of appeals concluded, the district court's loss calculation did not include all of the loss caused by petitioner's conduct. For example, the district court did not include losses from the Summer Street scheme because the conduct that caused those losses occurred before the effective date of the Sentencing Guidelines. Pet. App. 13A-14A. There is therefore no basis for further review of petitioner's Double Jeopardy claim.

2. There is no need to hold this case for the disposition of *Hudson* v. *United States*, No. 96-976 (argued Oct. 8, 1997). In that case, among the issues before the Court are whether a civil money penalty assessed pursuant to a broad regulatory scheme can ever constitute punishment within the meaning of *Halper*, and if so, whether such a penalty is punishment if it is in an amount rationally related to the government's costs of investigation and enforcement.

Here, however, the courts below have concluded that the monetary assessment against petitioner was not a civil money penalty, but rather constituted restitution for the losses caused by petitioner's conduct as an officer of Charter Federal. See Pet. App. 68A. Although the court of appeals alluded to the finding that the district court's Sentencing Guidelines loss calculation did not include the government's costs of investigation and enforcement, the court primarily relied on the fact that "[t]he OTS settlement requiring [petitioner] to pay $1.8 million was based on OTS figures estimating a total loss of $2.275 million." *Id.* at 13A. This case therefore does not present the question at issue in *Hudson*, and a decision in favor of petitioners in that case would not assist petitioner here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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